83-1436

No. _____

In The
Supreme Court of the United States
October Term, 1983

DARLENE R. WHITE,
Petitioner,

vs.

INTERNATIONAL TELEPHONE AND TELEGRAPH COMPANY, and its wholly owned subsidiaries, by whatever name known, including Aetna Finance Company,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a denial of the right of equal protection under the Fourteenth Amendment to the Constitution of The United States to fire a female employee because of her pregnancy.

2. Whether there is a rational and constitutionally justifiable distinction between pregnant public employees and pregnant private employees which allows the former, but not the latter, to recover against their employer in tort, contract, or under 42 USC § 1983 for a violation of their Fourteenth Amendment equal protection rights resulting from a wrongful firing due to pregnancy. Stated another way, is it constitutionally permissible for the Georgia statutory rule of employee-terminable-at-will to be relied upon by a private employer to fire a pregnant private employee due to her pregnancy without any resulting liability to the private employer when on the other hand a public employer would be liable for violating the employee's constitutional rights.

3. Whether the written promises contained in the work rules and also in a signed written leave of absence form, executed by both parties, contractually guarantee and define the constitutionally protected right not to be fired due to pregnancy, so as to create an additional priviate remedy for the pregnant private employee for the violation and abridgement of such right by a private employer.

4. Whether the State law doctrine of employee-terminable-at-will is of such magnitude that as a matter of public policy, it was not pre-empted under the Supremacy

Clause of the United States Constitution by the enactment of Title VII, Section 708, 42 USC § 2000E, so that a private employer may legally use terminable-at-will as a legal defense to any action by a private employee asserting a claim in breach of contract, tort or under 42 USC § 1983 for deprivation of her rights by wrongful firing due to pregnancy.

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OFFICIAL REPORT OF OPINION BELOW

Darlene White, individually and on behalf of the class, Plaintiff-Appellant vs. ITT, a Corporation; International Telephone and Telegraph Corporation; XYZ Corporation, d/b/a ITT, Aetna Finance Company, Defendants-Appellees: Appeal No. 81-8000; —— F. 2d. 300 (11th Cir. 1983), decided on October 31, 1983.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is from an Opinion of the Eleventh Circuit Court of Appeals, dated October 31, 1983. A Petition for rehearing and for rehearing en banc was filed by Darlene R. White but was denied by the Eleventh Circuit on December 12, 1983. Petitioner further petitioned the Eleventh Circuit to stay the issuance of mandate in order to allow the filing of a Petition of Writ of Certiorari in the Supreme Court, but the Eleventh Circuit also denied that Petition on January 13, 1984.

The original lawsuit was filed in the United States District Court, Middle District of Georgia, Columbus Division, and judgments of that Court after jury trial were entered on September 24, 1981 and a JNOV was also entered by the District Court on November 30, 1981 based upon an order dated November 25, 1981 granting Respondent Aetna Finance Company's Motion For JNOV.

The Supreme Court of the United States of America has jurisdiction in this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by virtue and under 28 USC § 1254, § 1201, and under the Constitution of the United States, Article 3, Sections 1 and 2.

CITATION OF AUTHORITY

1. Section 1, Amendment XIV to the United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article 1, Section 8, Paragraph 3, United States Constitution

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

3. 42 USC § 2000e, Title VII, Civil Rights Act of 1964

Discrimination Because of Race, Color, Religion, Sex or National Origin

Sec. 703.(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

Effect on State Laws

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

4. Official Code of Georgia Annotated § 34-7-1

Determination of term of employment; manner of termination of indefinite hiring.

If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party. (Civil Code 1895, § 2614; Civil Code 1910, § 3133; Code 1933, § 66-101.)

5. Official Code of Georgia Annotated § 34-2-6

Specific Powers and Duties of Commissioner.

In addition to such other duties and powers as may be conferred upon him by law, the Commissioner of Labor shall have the power, jurisdiction, and authority:

(1) To superintend the enforcement of all labor laws in the State of Georgia, the enforcement of which is not otherwise specifically provided for, and all rules and regulations made pursuant to this title;

(5) To do all in his power to promote the voluntary arbitration, mediation and conciliation of disputes between employers and employees. . . .

Official Code of Georgia Annotated § 34-5-1.

Declaration of public policy regarding discriminatory wage practices based on sex.

. . . It is declared to be the policy of the State of Georgia to eliminate, as rapidly as possible, by exercise of the police power of this state, discriminatory wage practices based on sex. (Ga. L. 1966, p. 582, § 1.)

Official Code of Georgia Annotated § 34-5-4.

Powers and authority of Commissioner under chapter. (a) The Commissioner shall have the power and it shall be his duty to carry out this chapter; and for this purpose the Commissioner or his authorized representative shall have the power to:

(3) Eliminate pay practices unlawful under this chapter by informal methods of conference, conciliation, and persuasion.

STATEMENT OF THE CASE

Fired for being pregnant was the epithet of Mrs. Darlene White's career as an employee of Respondent International Telephone and Telegraph Company (herein ITT) and Aetna Finance Company. Hired on January 28, 1975 as a credit assistant, trained/tested on her employer's written work rules and procedures containing written promises (A-52) guaranteeing reinstatement after pregnancy,[1] this gentle Alabama lady was dismayed to learn that her employer refused to comply with the written reinstatement promise contained in the Leave of Absence Form of September 7, 1977 (A-48)[2]. Her employ-

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[1]11.063 *Maternity Leave*

A six month Leave of Absence for Maternity purposes will be granted only to those pregnant employees fully intending to return to work after the birth of their child. A PAR, accompanied by a Leave of Absence form (see M11.062 for procedures) must be submitted indicating the Maternity Leave. The manager need not obtain prior approval and is empowered to initiate the PAR on his own authority. When completing the Request for Leave of Absence forms, "note the date of return" as six months after the "beginning date."

A pregnant employee may continue working for as long as she desires before delivery and then be granted a leave of absence at the end of which she may return to her old position or another of similar content and pay. The company may require certification after the 7th month, on a periodic basis that the employee is physically able to continue working. Such certification must come from the employee's doctor.

If the employee does not report for work on the scheduled "date of return" or notify the company of other circumstances the employee will be automatically terminated as of the noted "date of return."

[2]Beginning Date Sept. 15, 1977 (First scheduled work day absent)

(Continued on following page)

er's extensive written rules governing the terms and conditions of their contractual employer-employee relationship (only a small part of which are appended) set out the promised right to pregnancy leave, reinstatement, grounds for termination, termination pay rights, and even incorporated the employer's promise to recognize all federal employment laws including Title VII of the Civil Rights Act of 1964. (A-72-75). When Mrs. White returned to work on March 13, 1978 (after the 6 month pregnancy leave) she learned that her job had been filled at the time she left work (A-83). She returned twice more, in September, 1978 and in March, 1979, in order to comply with her contractual duty to return after her leave. She was never reinstated. She filed a Title VII charge with the EEOC, and during the initial stage of a Muscogee County State Court suit learned, under oath from her state manager, that she was really employed by International Telephone and Telegraph Company. The

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(Continued from previous page)

Date of Expected Return March 15, 1978 (First day returned to work) (not to exceed 6 months)

I understand that if I fail to return to work on the above-indicated date or fail to notify the Company in writing prior to said date, that I wish to extend my leave of absence for an additional period of time, my employment will be terminated. I further understand that even though I may request an extension of my leave, it is within the sole discretion of the Company whether and for how long such an extension is granted to me.

When I return to work at the expiration of my leave of absence, I may return to the position that I held prior to this leave of absence or to another position comparable in function and compensation; if an opening then exists. If there are no positions available at the time I am scheduled to return to work, I understand that I will be re-employed in the first position which becomes available for which I am qualified.

State Court action was dismissed, and suit in U.S. District Court, Middle District of Georgia followed on November 29, 1979. Jurisdiction was based on diversity of citizenship and the action under 42 USC § 1983 and 42 USC § 2000e. The suit plead breach of employment contract in which the employee's rights under Title VII were not only implied in but were an express part of the written contract, breach of the continuous duty to reinstate pursuant to the Leave of Absence contract, fraud, and a count for damages under 42 USC § 1983 due to the violation of her constitutional right of equal protection of laws because of discharge for pregnancy. (A-31-41). Since the written rules and leave form were applied to all employees who took pregnancy leave, the action was brought as a class action. Evidence developed showed ITT disregarded subsidiary corporate identities and thus all wholly owned subsidiaries were sued. Mrs. White had a different employer listed each year on her W-2 form for taxes. Respondent's defense to her entire suit centered around the doctrine of "employee-terminable-at-will", OCGA § 34-7-1. The most they would admit was that at different dates beginning March 13, 1978 (A-84; compared with A-81), Mrs. White became a "non-employee"; but she was never fired, (A-84) nor paid her termination pay. One is reminded of a Solzhenitsyn character who merely becomes a non-entity. Respondent's explanation of the written promises in the personnel manual was that these were "in-house" documents with no legal significance.

The District Court on the first day of Trial (A-76) arbitrarily and without any motion by Respondents refused to allow Mrs. White to even try her claim under 42 USC § 1983. Certain pre-trial rulings also restricted dis-

covery and parties identification, but these were not even considered by the Eleventh Circuit.

A jury trial on September 21-24, 1981 gave a verdict to Mrs. White against Aetna Finance Company for $34,055.00 general damages for breach of contract and $1,000.00 punitive damages for fraud. (A-24-25). The jury concluded Mrs. White was fired due to her pregnancy. A directed verdict was ordered for ITT. (A-26). Subsequently, the trial court granted Aetna's motion for JNOV. (A-22-23). Mrs. White appealed to the Eleventh Circuit Court of Appeals.

On October 31, 1983, the Eleventh Circuit held that Mrs. White was an employee terminable at will and thus upheld the only legal defense of Respondents. (A-1-10). This defense of terminable-at-will became a complete defense to a jury finding that Mrs. White was fired due to her pregnancy. The Eleventh Circuit Court also agreed with the employer that the written promises made to the employees in the work rules and leave of absence form were "executory", of no legal effect and totally unenforceable.

A motion for rehearing and rehearing en banc was denied on December 12, 1983 and a motion for stay of mandate in the Eleventh Circuit was denied on January 13, 1984. This Petition for Writ of Certiorari followed.

While the case was pending appeal in the Eleventh Circuit, the EEOC sent out a Right to Sue letter on February 25, 1983, also four years after her EEOC charge was filed. The EEOC took the position that the filing of her suit in District Court caused the EEOC to abstain from jurisdiction. A collateral problem of someone "sanitizing" her EEOC file and unauthorized access to that

file causes Petitioner to redact portions of the official EEOC explanatory letter. (A-18-19).

The fact that U.S. News & World Reports nationally trumpeted (A-88) Mrs. White's defeat in the Eleventh Circuit points out the grave significance to all pregnant private employees in this country of the impact of this case if the ruling of the Eleventh Circuit is allowed to stand. Mrs. White was fired due to her pregnancy and was found to have no legal recourse against her employer for this violation of her constitutional rights.

The Supreme Court must grant the Writ of Certiorari to the Eleventh Circuit, and resolve the legal issue raised in this important question of federal law.

ARGUMENT AND AUTHORITY

1. Firing a female employee due to her pregnancy violates Equal Protection Clause of the Fourteenth Amendment.

The Petitioner, Mrs. Darlene R. White, is married and the mother of two children. She was married and pregnant when terminated by Respondents on September 7, 1977. The trial jury concluded she was fired because of her pregnancy. It has already been established that a discharge of a female employee for unwed pregnancy constitutes a violation of the equal protection clause of the Fourteenth Amendment. *Avery v. Homewood City Bd. of Ed.* 674 F. 2d 337, 342 (11th Cir. 1982), cert. denied, 103 S. Ct. 2119 (1983). *Andrews v. Drew Municipal Separate School Dist.* 507 F. 2d 611 (5th Cir. 1975) cert. dismissed as improv. granted, 425 U.S. 559, 96 S. Ct. 1752, 48 L. Ed. 2d. 169 (1976). These decisions are in line with those cases of this Court recognizing as unlaw-

ful the invidiously discriminatory acts practiced against pregnant female employees due to their pregnancy. *Nashville Gas. Co. v. Satty,* 434 U.S. 146, 98 S. Ct. 347, 54 L. Ed. 2d 356 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d. 343 (1976); and *Geduldig v. Aiello,* 417 U.S. 484, 94 S. Ct. 2487, 41 L. Ed. 2d. 256 (1974). It would need no elaboration to say that the firing of a married pregnant employee on account of her pregnancy also constitutes a violation of the equal protection clause. The firing results from the fact of the pregnancy, and not the status of the female leading up to the pregnancy. The equal protection violation arises from the gender-based distinction and not the marital status. Further, there is no question but that a firing of a pregnant employee because of pregnancy is an unlawful employment practice. *Nashville Gas Co. v. Satty,* supra; and 42 USC § 2000e.

In the case sub judice, Mrs. White is a private female employee whose private employer, Respondents ITT and Aetna Finance Company, fired her due to her pregnancy in 1977. Just like the fired pregnant teacher in *Avery,* supra, Mrs. White filed suit against her employers. Both women filed claims under 42 USC § 1983 alleging violation of equal protection rights. The public employee teacher in *Avery* sued on her Title VII claim. Mrs. White, who filed a Title VII complaint with the Equal Employment Opportunity Commission, also alleged in her breach of contract claim that the Respondents had violated her Title VII rights which were expressly made a part of the written terms and conditions of her employment contract. Mrs. White also filed a tort claim for fraud.

The Eleventh Circuit Court of Appeals has rendered two entirely different legal opinions regarding the respective rights of Mrs. White in comparison with those of the public employee teacher in *Avery*, supra. Judge Tjoflat wrote both opinions. In the case sub judice, the original opinion ignored the § 1983 claim of Mrs. White, — F. 2d 300, and denied without opinion the motion for rehearing which brought this glaring omission to the Eleventh Circuit's attention. The District Court had preemptorily ruled on the day of trial (A-76) that Mrs. White could not even attempt to try her § 1983 claim. The Eleventh Circuit ignored the error asserted in this regard even though the Complaint alleged a violation of her constitutional right of equal protection and raised such claim under 42 USC § 1983.

It can only be deduced from this treatment of her claim of violation of constitutional rights that Mrs. White, a pregnant private employee fired due to her pregnancy, either does not have a constitutional right not to be fired due to pregnancy, or that the private employer can safely violate a pregnant female's constitutional right in this aspect of employment with impunity.

It cannot be seriously argued that Mrs. White's equal protection right against discharge due to pregnancy are different from the public employee teacher in *Avery*. Mrs. White submits that she does have this same right. The pregnant female in *Nashville Gas Co. v. Satty*, supra, was a private employee working for a private employer, as were the pregnant females in *In Re Southwestern Bell Telephone Company Maternity Benefits Litigation*, 602 F. 2d 845 (8th Cir. 1979).

This is an extremely important question of federal law which has not been, but should be, settled by this Court. The Eleventh Circuit has decided this federal question arising during the course of this litigation in such a way as to squarely conflict with this Court's decision in *Satty*, supra. The importance of this matter to the national business community is emphasized by the fact that the Eleventh Circuit's ruling was hailed in a national news magazine under the heading: "Maternity Leave Doesn't Guarantee Employment to a Mother After Her Baby is Born." The implications thus reach beyond the confines of the case sub judice. Private employees are not second class citizens. For a violation of a constitutional right there must be a remedy, and if none the Supreme Court must fashion one.

2. There is no rational or constitutionally justifiable basis to distinguish between pregnant private employees and pregnant public employees for purposes of asserting a remedy for a violation of equal protection rights resulting from a firing due to pregnancy.

Mrs. White, in her initial complaint, raised the claim for violation of her constitutional rights under 42 USC § 1983. The trial court arbitrarily refused to submit this issue to the jury. Notwithstanding this arbitrary denial by the trial court, Mrs. White recovered a general verdict from the jury for breach of contract, for fraud, and the jury specifically found that she had been wrongfully fired due to her pregnancy. The trial court, however, granted the employer's Motion for JNOV and set aside the jury verdict based upon the trial court's finding that Mrs. White was an employee terminable at will under OCGA Section

34-7-1. The Eleventh Circuit Opinion affirmed this finding that this Georgia Statute allows an employee to be terminated at will notwithstanding the fact that the termination was due to her pregnancy. In the Motion for Rehearing and for Rehearing En Banc, Mrs. White specifically raised the fact that the Eleventh Circuit's original opinion failed completely to deal with the assertion of a claim under 42 USC § 1983. The Eleventh Circuit denied the Motion for Rehearing, without Opinion. Thus, the terminable-at-will doctrine defeats a § 1983 claim.

As already shown, the Fourteenth Amendment's Equal Protection Clause gives to every pregnant female employee the Constitutional Right not to be fired due to her pregnancy. A pregnant public employee can maintain an action for violation of this Constitutional Right by asserting a claim pursuant to 42 USC § 1983. *Avery v. Homewood City Board of Education*, supra. The analysis must next turn to answering the question of why Mrs. White, a pregnant private employee, cannot enforce this identical constitutional right under 42 USC § 1983. The only distinction must lie in the fact that the pregnant private employee works for a private employer and therefore the nexus of the employer to state action must be shown. The case of Darlene White meets all other requirements of a 42 USC § 1983 action.

Mrs. White's § 1983 claim clearly complies with the nexus requirements this Court has laid down for the bringing of a § 1983 claim against a private person such as Respondents. In *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 447 (1974), the test for determining if private action is state action for purposes of a § 1983 claim was stated as follows:

> "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated on that of the state itself. . . . The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. id. 351.
>
> "We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." id. 352.

In actual application of the above rules, the Court looked for the "symbiotic relationship", id. 351, between the private entity and the State in order to show the interdependence with the private entity. The actions of Respondents herein in relying upon OCGA § 34-7-1 terminable-at-will doctrine to fire a pregnant woman and thus end a dispute over her leave of absence for pregnancy fulfills the necessary requirement. The State of Georgia has comprehensive laws regulating the sex-based discriminatory acts affecting pay in employment. OCGA § 34-5-1. The Georgia Labor Commissioner is required to regulate and resolve disputes arising from such sexually discriminatory actions OCGA § 34-5-4. Further, the Georgia Department of Labor exercises state authority over all employees in the State of Georgia to regulate and control general conditions of employment and terms of employment. OCGA § 34-2-6. Respondent ITT and Aetna Finance Company abrogated these state rights and duties to themselves by acting as the Labor Commissioner and resolving the leave of absence for pregnancy issue by simply firing Mrs. White. This clearly falls within the specific statutory duties of the Labor Commissioner to

> "Eliminate pay practices unlawful under this chapter by informed methods of conference, conciliation, and persuasion."
>
> OCGA § 34-5-4(a)(3).

Respondents certainly eliminated Mrs. White and her pay by firing her. She was pregnant when she took her leave of absence to have a child and pregnant when she was fired. This informal method surely persuaded her that her employers had resolved the dispute over her returning to her job after the pregnancy even though she was contractually guaranteed reinstatement. Under 42 USC § 2000e, she was additionally guaranteed reinstatement since the employer had a written policy to that effect. *In Re Southwestern Bell Telephone Company Maternity Benefits Litigation*, supra. Thus the State action requirement under § 1983 is satisfied due to the symbiotic relation between the statutory actions of the State Labor Department and the actions taken by the employer.

The nexus between the employer and the State is amplified due to the fact that Respondent-employers relied upon an invalid state law, OCGA § 34-7-1, to fire Mrs. White as part of their conciliation efforts over a sexually discriminatory dispute. The critical factor as to the nexus is that the terminable-at-will rule statutorily justified the employer in violating Mrs. White's equal protection right not to be fired due to pregnancy. The District Court and Eleventh Circuit both upheld this principle implicitly in their orders. Overlooked by both these lower courts was this critical factor. As succinctly stated in *Jackson v. Metropolitan Edison Company*, supra,

> "While the principle that private action is immune from the restrictions of the Fourteenth Amendment are well established and easily stated, the question

whether particular conduct is 'private', on the one hand, or 'state action', on the other hand, frequently admits of no easy answer." id. 351.

Therefore, the state law of terminable-at-will as enforced by the State Labor Commissioner in resolving the dispute over sexually discriminatory acts in the employment relationship would cause Mrs. White to be fired due to pregnancy in violation of her Fourteenth Amendment rights. The State action requirement is satisfied.

The analysis must next determine whether the public policy of the United States demands that the Courts draw a distinction between a pregnant public employee and a pregnant private employee for purposes of allowing the public employee to enforce this constitutional right, but prohibiting the private employee from enforcing the right under the mandate of State law. In other words, are the respective states free to pass laws which the free economic system of this country can rely upon to override the equal protection of the law guaranteed under the Fourteenth Amendment which prevents discrimination against a pregnant private employee and protects her from a firing due to her pregnancy? The legal concept of employment-terminable-at-will contained in OCGA § 34-7-1, is recognized in all States of the United States and gives freedom of choice of employment to both the employee and the employer. Must this economic system be permitted to override the enforcement of a constitutional right of a private employee who happens to be pregnant? This same free enterprise right and freedom to labor right applies with equal force in the public employment sector, which is the area where the Courts have allowed enforcement of the constitutional rights up to this date by the pregnant public employees. *Avery v. Homewood City Bd. of Ed.*,

supra. It is time to reevaluate the constitutional dimension for making this distinction between recognizing private enforcement of the constitutional rights of a pregnant public employee but denying same to a pregnant private employee.

The Fourteenth Amendment of the United States was passed to insure that all citizens had the identical rights to equal enforcement of the law, and that there was no privilege segment of our society insofar as enforcement of constitutional rights is concerned. 42 USC § 1983 was passed and styled as "An Act to Enforce The Provision of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes", 17 Stat. 13, Act of April 20, 1871, Chapter 22, Section 1. Where States pass laws which when applied have the direct effect of denying a right clearly provided under the Fourteenth Amendment to the United States Constitution, then such abridgement must be reachable by a direct action under 42 USC § 1983, which carries out the very purpose of the Act itself as originally enacted.

In conclusion, where the private employer relies upon a specific State law to completely deny this constitutional right under the Fourteenth Amendment, then the private employee can maintain an action under 42 USC § 1983 for the abridgement of that constitutional right. The requisite nexus is satisfied by the existence of the employer relying upon the specific statutory enactment of the State to effect the illegal firing as well as carrying out the duties of the State Labor Department to resolve labor disputes between employer and employee arising from the fact of pregnancy of private employees.

Applied in another context, but with the same purpose in mind, the Opinion of the Eleventh Circuit in this case in its upholding of the terminable-at-will doctrine, would allow a private employer to fire an employee on account of his race and claim that such firing was pursuant to the authority of the terminable-at-will statute enforced in the employer's State. The private employee who had been fired on account of his race, even though he proved that race was the reason for the firing, could not recover against the private employer simply due to the existence of the terminable-at-will doctrine, whether suit was under § 1983, tort or contract. This is what the Eleventh Circuit has so held by Judicially recognizing the supremacy of the State law doctrine of terminable-at-will over the Constitutional doctrine that you cannot fire an employee due to a pregnancy. The legal principles are identical.

3. The written promises contained in the work rules and leave of absence form contractually guarantee and define the constitutional right not to be fired due to pregnancy and are enforceable as a private remedy by the employee.

Unlike any prior case, the employer, ITT, in writing, promised its employees that their constitutional rights would be recognized as part of the contractual employer/employee relationship:

> "To express formally that it is ITT Corporation's policy that qualified applicants would be employed and trained during employment without regard to race, color, religion, sex, age, national origin, or physical or mental handicap.

This policy is applicable to all aspects of the employment relationship, including hiring, placement, upgrading, transfer or demotion . . . the policy will also apply to training during employment, rates of pay or other compensation, selection for training and selection for lay-off or termination, and all of the terms and conditions of employment."

"Equal Employment Opportunity by Federal contract as defined in Executive Order 11246 and. . . ."

"Affirmative action is defined in revised Order 4, paragraph 60.210 of the OFCC Sex Discrimination Guidelines as 'a set of specific and results oriented procedures to which a contractor commits himself to apply every good faith effort' in eliminating the vestiges of past discrimination within his/her work environment."

". . . all employees will continue to receive equal treatment in questions of transfer or a promotion, upgrading, and all terms and conditions of employment."

"Separation of employees will continue to be based solely on justifiable cause and not by any relationship to race, color, religion, sex, age, national origin, or physical or mental handicap."

(Appendix 72-75). These provisions are part of the personnel manual.)

In addition to the above written promises and guarantees made by the employer in written form, the employer further signed the written leave of absence form which promised the right of reinstatement to Mrs. White, a pregnant private employee.

Notwithstanding all of the above, the Eleventh Circuit has ruled that Mrs. White is terminable-at-will under OCGA § 34-7-1, even though the jury found a contract and held that she had been fired due to her pregnancy. The

Eleventh Circuit further held that the above stated written promises by the employer were "executory promises" which were unenforceable.

> "Clearly, White was an employee terminable at will. As such, any executory promises arising out of the employment relationship, including a promise to reinstate after maternity leave, are wholly unenforceable. Aetna was therefore entitled to a directed verdict, and thus judgment JNOV, of White's contract claim."
>
> — F. 2d, Page 303 (1983)

The above stated rule from the decision in Mrs. White's case completely contradicts the decision of the Eleventh Circuit in the case of *Barnett v. The Housing Authority of the City of Atlanta*, 707 F. 2d 1571 (1983). In *Barnett*, the Eleventh Circuit stated that the rules and regulations contained in the Personnel Policy were enforceable and that it set forth terms, conditions and procedures governing employment with the Atlanta Housing Authority. The Eleventh Circuit further went on to state that the terminable-at-will doctrine was "groundless" in the context of this public employee (707 F. 2d at 3721, footnote 9 (1983)).

The findings in the *Barnett* case in juxtaposition with *White* highlights the triple anomaly which these contrary opinions of the Eleventh Circuit have created. First, the Eleventh Circuit has held that only a public employee can enforce a constitutional right through 42 USC § 1983, even though the firing is based on State law. Secondly, the Eleventh Circuit has held that the legal doctrine of employee-terminable-at-will, OCGA § 34-7-1, applies only to a private employee but not to a public employee. Third,

the Eleventh Circuit has held that the written work rules and promises of the public employer are enforceable by a public employee, but that the identical written rules and written promises of a private employer are not enforceable by a private employee due to the fact that they are "executory" in nature.

The insidious nature of the conflict between the *Barnett* case and the *Darlene White* case coming out of the same Eleventh Circuit, should be apparent when one analyzes the *Barnett* case in light of the fact that it was not necessary for the Eleventh Circuit to hold that the work rules were enforceable and that the doctrine of terminable-at-will was inapplicable. The Eleventh Circuit in *Barnett* could have followed the Fifth Circuit in *Avery*, supra, and simply found that the constitutional rights of *Barnett* had been violated and therefore, the § 1983 action would lie. By going forward, however, the *Barnett* case clearly stands for the proposition that in addition to a § 1983 action, (a) a public employee can enforce the terms of the work rules in a contract action, (b) a public employee can enforce the terms of a contract, even though that contract is not for a specified term, (c) and terminable-at-will is not a defense that can be used against a public employee, and (d) the *Darlene White* case clearly stands for none of the above.

If these written work rules and promises are "executory" in nature to the private employee, then they must also be executory in nature to a public employee and totally unenforceable. Otherwise an impermissible distinction between classes of employees is drawn, which violates the Equal Protection provisions of the Fourteenth

Amendment. The Eleventh Circuit has at best, created a legal situation wherein State law does not apply to a public employee, but most assuredly applies to a private employee, so that the employer in the private context can rely upon State law to deny the constitutional rights of a pregnant private employee.

The Eleventh Circuit has failed, however, to define the Constitutional difference between the public and private employee, for purposes of recognizing the constitutional rights of each categorized employees as well as allowing the enforcement of the constitutional rights of such employees. No Constitutionally permissible distinction can be allowed which would permit the private employer to ignore the Constitutional right as well as the contractually guaranteed recognition and enforcement of this Right, but at the same time, require the public employer to live up to the same written promises made to the public employee. To do so, would create another violation of the Equal Protection rights for the employee in the public sector whose rights under the law are superior to the rights of a private employee not to be fired due to pregnancy.

There is only one state law applicable to both public as well as private, OCGA § 34-7-1. That Statute does not draw any difference between the types of employees that it covers, and in fact, by virtue of the *Barnett* case, is specifically applicable to a public employee except when they are written promises contained in the work rules which supercede this legal doctrine. In Mrs. White's case, there were also written promises contained in her work rules as well, which recognize and contractually enforce the Constitutional guarantees that a private employee

would also have, if pregnant. The Constitution of the United States cannot be so twisted and distorted so as to create a legally recognizable difference between a pregnant private employee and a pregnant public employee, under State law. The written work rules and promises and written leave of absence form entered into by a private employer and private employee should supercede and override the legal effect of the terminable-at-will doctrine under State law as well as the executory promise doctrine based on that State law for the same reasons that justified this result in the *Barnett* case. There is no Constitutional basis to apply the State law differently between the private employee and the public employee where federally guaranteed rights are concerned. The Fourtenth Amendment to the United States Constitution requires equal application of the same State law to all classes of employees. Are we now to use the Fourteenth Amendment via 42 USC § 1983 to justify an unequal application of the State law which is precisely the result that has been achieved between the *Darlene White* case and the *Barnett* case.

Herein lies a very distinct and novel basis justifying the Supreme Court in allowing this appeal. The Eleventh Circuit Opinions conflict between the rights granted to a public employee and the rights granted to a private employee for the enforcement of the identical written promises contained in the work rules and leave of absence form under the same State laws. One employee can enforce such a contract; the other cannot. Such an unequal restraint on the ability of a private employee to contract with her employer is not justified under any theory of law.

Under the *Barnett* case, supra, the public employee can contract with his employer without specifying a definite term of employment, viz, for an indefinite term. On the other hand, the private employee has no such right. Thus, OCGA § 34-7-1 has been interpreted to mean that only a private employee is terminable-at-will and therefore subject to the executory promise limitations that arise out of that statute. *Murphine v. Hospital Authority of Floyd County,* 151 Ga. App. 722 (1979). It is quite obvious that the State law in question does not establish, by its terms, any such distinction.

Nevertheless, the effect of the Court decisions which have been cited act as a restraint on one class of employees in enforcing terms of an employment contract with an employer, but relieves that very same constraint from the public employees who may enforce the terms on their employer. This is an unconstitutional and unreasonable restraint upon the ability to contract. Such a restraint is an abridgement of a property right under the Fourteenth Amendment using state law as the justification. A public employee has a property right in his employment, *Brownlee v. Williams,* 233 Ga. 548 (1975), *Barnett v. Housing Authority of City of Atlanta,* 707 F. 2d 1251 (1983) and a private employee has the same property right in her private employment, *Muse v. Connell,* 62 Ga. App. 296, 303 (1940); *Hughes v. State Bd.,* 162 Ga. 246 (1926). Thus, a public employee has a viable property right in her employment but a private employee does not as a result of the *White* opinion.

4. The Doctrine of Employee-Terminable-at-will has been preempted under the Supremacy Clause and

is no longer a legal defense to private employee suit over firing due to pregnancy.

The Constitution must limit the right of the employer to terminate its employees. An employer may not fire an employee if pregnant. *Avery v. Homewood Bd. of Ed.*, supra. This has already been established by this Court. The public policy implications of extending the enforcement of this constitutional right through a § 1983 action to private pregnant employees has not been dealt with by this Court and is one of the central public policy questions that must be answered. Nor has this Court dealt with the proposition that an otherwise valid contract of employment may not be voided via the application of a State law invalidated because it is inconsistent with Title VII. The rulings of the Eleventh Circuit and of this Court recognize that public employers cannot terminate a public employee "at will" and therefore the terminable-at-will doctrine does not apply to a public sector employee where there are in existence written promises and work rules governing the terms and conditions of the employment. Mrs. White, in this case, submits that the Supreme Court must extend this Constitutional doctrine and public policy argument to the private sector employee so that the private sector employers cannot arbitrarily "terminate-at-will" an employee, where to do so would constitute a denial of a constitutional right. A corollary to this public policy issue is the extent to which such right to terminate-at-will is limited by existing constitutional rights and the private employees ability to enforce such rights by an action in contract, tort or under 42 USC § 1983. The Congress has already set forth the public policy in this regard in Title VII, § 708; 42 USC § 2000e.

This specific Section has been dealt with in the case of *LeBlanc v. Southern Bell Telephone and Telegraph Company,* 333 F. Supp. 602 (1971). The *LeBlanc* case is decisive on the issues that the Eleventh Circuit wrongfully applied the Georgia Statute and the doctrine of executory promises based on that Statute when it allowed an invalid State law to defeat a constitutional right. On Page 609 of the *LeBlanc* case, the Court ruled as follows:

> "We agree with those Courts that these Sections are intended to save those State laws which aim at preventing employment discrimination and not State laws such as these which purport 'to require . . . an unlawful employment practice under this Title' or which are 'inconsistent with any of the purposes of this act'.
>
> These Statutes then clearly regulate a field which Congress has entered by enacting Title VII of the Civil Rights Act of 1964. Where State and Federal law conflict, as here, the State law must be held to have been preempted by the Federal law through the operation of the Supremacy clause of the United States Constitution. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824). Therefore, insofar as any of the provisions of La. Rev. Stat. §§ 23:311, 314, 332 and 337 conflict with any of the provisions of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq., they are invalid under the Supremacy clause."

There can be no doubt that the only reason ITT could dishonor its written contracts (leave of absence) with Darlene White (wherein she is guaranteed the right of reemployment) in a Breach of Contract action is because ITT relied upon the State's statute which allowed them to fire Darlene White for an illegal reason without legal redress. In essence, ITT was allowed to use, as a defense to a contract and tort action under State law, a State statute

which conflicted with Title VII. Since the promises to Darlene White were consistent with and incorporated Title VII rights, a breach of those promises was definitely in violation of Title VII. The Georgia statute which allows an employer who violates Title VII to defeat an otherwise valid contract claim, must be declared void. The federal law has Supremacy over any inconsistent State law such as OCGA § 34-7-1 whose progeny is the doctrine that employer promises to employees are unenforceable because executory as a matter of law. Therefore it prohibits the commission of an act which is an unlawful employment practice. This Court has long held that the firing of a private employee for reasons of pregnancy is an unlawful employment practice. 42 USC § 2000e.

Any limitation placed on the method or manner of enforcement of such constitutional rights by the pregnant employee, would deprive such pregnant employee of adequate redress of her constitutional rights. For this Court to hold that the pregnant private employee can only enforce and obtain redress for a violation of her constitutional rights through means of a Title VII administrative proceeding would be to create another unconstitutional deprivation under the Equal Protection Provision of the Fourteenth Amendment of the private employee's constitutional rights. For example, if the terminable-at-will doctrine of OCGA § 34-7-1 is void under Title VII, § 708, as stated above, then it must also be void for purposes of enforcement of the constitutional rights by the private employee regardless of the manner in which such private employee seeks to enforce her constitutional rights and regardless of the type of remedy she chooses for such

enforcement, whether action through Title VII, or by personal suit for breach of contract, redress in tort or private action under 42 USC § 1983. Should this Court decide that the private employee can only maintain such redress through a Title VII administrative action, then this Court must also require that a public employee can only redress any such violation through a Title VII action as well. Clearly, the Constitution and Title VII set forth a federal public policy which no State law rule of terminable-at-will or common law rule of construction of contracts known "executory promises" can defeat. Darlene White cannot be reduced to second class citizenship by virtue of the fact that she worked for a private employer instead of a public employer.

CONCLUSION

In conclusion Petitioner would reiterate that a basic and grave injustice has occurred in this case. Petitioner had a written contract with Respondents that they would not terminate her due to her pregnancy. There were extensive work rules which adopted the guarantees contained in Title VII law into the terms of the employment contract. Nevertheless, Petitioner was fired because of her pregnancy and as a consequence, the jury awarded her a favorable verdict. Subsequently, Petitioner has been defeated because of a state statute which says that she is an employee-terminable-at-will because her contract had no specified term of employment, and therefore her employer could lie to her at will and abridge her Constitutional rights with impunity.

Petitioner is entitled to have the Eleventh Circuit Court of Appeals opinion reversed and her judgment reinstated. It is a violation of Petitioner's Fourteenth Amendment rights for her employer to be allowed to defeat a contract or tort claim by relying upon a state statute under circumstances where the cause of action arises from an illegal firing in violation of Title VII. To the extent that the State statute allowing the wrongful firing is inconsistent with federal law, it is void. Since the doctrine of employee-terminable-at-will is void for being inconsistent with federal law, then Darlene White's contract and tort claims should not be thus defeated.

Equal protection of the laws in this case demand that Respondents pay for their wrongdoing in firing Petitioner due to her pregnancy. In addition to removing the offending statute as a defense in the case sub judice, both public policy and Title VII § 708 require that a private employee must be placed on an equal basis with public employees so far as protecting their property rights under State law. An offending State statute provides the nexus necessary to afford the private employee a § 1983 action.

Finally, there is no Constitutional justification for allowing a State statute to be applied against a private employee to defeat her constitutional right and not applied against a public employee in the same way. This unequal application of the same State law to abridge the right of a private employee but not a public employee violates basic Fourteenth Amendment protection provided under the Constitution.

WHEREFORE, Petitioner prays that the Court will order as follows:

1. Reverse the Eleventh Circuit Court of Appeals and reinstate Petitioner's judgment against Respondents;

2. Declare that the doctrine of employee-terminable-at-will insofar as it is inconsistent with Title VII, is, under § 708 of Title VII, void and is not allowable as a defense by the employer to defeat a contract, tort or § 1983 action;

3. Order the Eleventh Circuit Court of Appeals to further consider the matters raised on the Appeal to that Court which were not considered since the ruling of the Trial Court in granting the JNOV was affirmed.

Respectfully submitted,

KENNETH L. FUNDERBURK

JAMES D. PATRICK

Attorneys for Petitioner, Darlene White

APPENDIX

Rule 21.1(k)

Darlene R. WHITE, individually and on behalf of the class,

Plaintiff-Appellant,

v.

I.T.T., a Corporation; International Telephone and Telegraph Corporation: XYZ Corporation, d/b/a I.T.T., et al.,

Defendants-Appellees.

No. 81-8000.

United States Court of Appeals,
Eleventh Circuit.

Oct. 31, 1983.

Former employee sought to recover money damages for alleged breach of employment contract and fraud. Prior to trial, employee's application to maintain suit as class action was denied. At trial, the United States District Court for the Middle District of Georgia, at Columbus, J. Robert Elliott, J., directed verdict for one defendant and, following jury verdict against other defendant, entered judgment notwithstanding the verdict. Employee appealed. The Court of Appeals held that: (1) absent any evidence that employment was for definite duration, employee was terminable at will and had no claim against employer for breach of employment contract; (2) the contract claim being unenforceable, employer's purported promise to rehire employee could not form basis of fraud

claim; and (3) dismissal, without elaboration, of class action claims for asserted failure to satisfy prerequisites of rule required remand for further proceedings on that issue.

Affirmed in part, and remanded in part.

1. Master and Servant 20, 36

Under Georgia law, absent any evidence that employment was for definite duration, employee was terminable at will; thus, employer owed no enforceable duty to retain employee and employee had no claim against employer for breach of any employment contract. O.C.G.A. § 34-7-1.

2. Master and Servant 20

Under Georgia law, hiring indefinite as to time is terminable at will of either party and creates no executory obligations. O.C.G.A. § 34-7-1.

3. Fraud 12

Under Georgia law, if promise is unenforceable it cannot form basis of fraud claim.

4. Fraud 12

Since employer's promise to rehire terminable-at-will employee after maternity leave was unenforceable under Georgia law, such promise could not form basis of fraud claims against employer either. O.C.G.A. § 34-7-1.

5. Federal Courts 946

Where district court dismissed, without elaboration, employee's class action claims due to asserted failure to satisfy prerequisites of federal rule, and, after employee lost individual claim at trial, she appealed dismissal of

class action, case would be remanded to the district court to determine presence of live controversy involving proposed class, and, if one is present, whether action is appropriate for class certification and whether employee is proper representative of proposed class. Fed.Rules Civ. Proc. Rule 23, 28 U.S.C.A.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

In this diversity action, Darlene White seeks to recover money damages from International Telephone and Telegraph Corporation (ITT), and two of its subsidiary corporations, Aetna Finance Company and XYZ Corporation,[1] for breach of an employment contract and fraud. Before trial, the district court denied White's application to maintain the suit as a class action and dismissed her claims against XYZ Corporation. At trial, the court directed a verdict for ITT at the close of all the evidence and, following a jury verdict against Aetna, entered a judgment nothwithstanding the verdict (n.o.v.). In this appeal, White seeks reinstatement of the jury's verdict against Aetna and a new trial against ITT. She also asks

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1. White's complaint alleged that ITT owned numerous subsidiary corporations and that these subsidiary corporations, other than Aetna Finance Company, were being sued as XYZ Corporation. The complaint did not name these XYZ subsidiaries, the record does not otherwise identify them, and none were served with process. Aetna's counsel filed an answer on behalf of "XYZ Corporation" that merely denied the allegations of the complaint.

us to instruct the district court to reinstate this case as a class action. We affirm the district court's entry of judgment for ITT and Aetna on White's individual claims against them, but remand the case to the district court for further proceedings on White's class action claims.

I.

White was hired by Aetna for its Columbus, Georgia, office in 1975. Soon after White began work, Aetna provided her with a copy of its "Management Manual," which contained Aetna's "Personnel Policies and Benefits." Aetna instructed White to become familiar with these policies and later tested her knowledge of them.

Aetna's policy on maternity leave was stated in section M11.063 of the manual. This section provided in pertinent part:

> A six month Leave of Absence for Maternity purposes will be granted only to those pregnant employees fully intending to work after the birth of their child. A . . . Leave of Absence form (see [section] M11.062 for procedures) must be submitted indicating the Maternity Leave. . . . A pregnant employee may continue working for as long as she desires before delivery and then be granted a leave of absence at the end of which she may return to her old position or another of similar content and pay.

Section M11.062 set forth the procedure for obtaining a maternity leave of absence: "All full-time employees requesting an extended Leave of Absence must complete a Request for Leave of Absence. . . ." A sample Request for Leave of Absence form appeared in the manual on the

page immediately following the maternity leave section, M11.063. This sample form was filled out as if an employee were requesting maternity leave, and stated:

> When I return to work at the expiration of my leave of absence, I may return to the position I held prior to this leave of absence or to another position comparable in function and compensation; *if an opening then exists.* If there are no positions available at the time I am scheduled to return to work, I understand that I will be re-employed in the first position which becomes available for which I am qualified.

(emphasis added).

In early September 1977, White executed such a Maternity Leave of Absence form, stating that her first day of absence would be September 15, 1977, and that she expected to return to work on March 15, 1978. Three days before White began this leave, Aetna hired a full-time employee to assume her duties. On March 13, 1978, approximately six months after her leave of absence began, White requested reinstatement. She was told that no opening existed, but that she would get the first available job.

In September 1978, Aetna created a new position, somewhat comparable to White's former position, in its Columbus office for the express purpose of implementing its affirmative action program. Aetna did not offer White this position, instead, it hired a minority applicant. White learned of Aetna's action in December 1978 and told an Aetna employee that she intended to sue the company for breach of its promise to reinstate her in the next available position. The Aetna employee communicated this statement to management. The position in question subsequent-

ly became open, and Aetna offered it to White. She responded to this offer by going to Aetna's Columbus office and demanding to know the terms of the offer. When the office manager informed her that only the regional manager, then out of town, could explain the offer, White became angry, argued loudly with the office manager, and eventually left. She did not pursue the offer, so Aetna, believing she had rejected it, filled the position with a minority applicant.

White then brought this class action in the district court, alleging breach of contract and fraud, and seeking individual and class relief. She alleged that ITT so controlled its subsidiary corporations, including Aetna, that ITT and its subsidiaries should be treated as one. White based her breach of contract and fraud claims on Aetna's Management Manual and Leave of Absence form. She alleged that these documents constituted a binding contract of employment which Aetna breached when it refused to reinstate her at the end of her maternity leave. White also alleged that Aetna never intended to honor its commitment to reinstate her and therefore was guilty of fraud. Aetna denied these allegations and, further, contended that if the Management Manual and Leave of Absence form constituted an employment contract, it was a contract of indefinite duration and thus terminable at will.

During pretrial discovery, ITT moved for a protective order limiting discovery to ITT, Aetna, and other ITT subsidiaries in the corporate chain between ITT and Aetna. ITT also moved to dismiss White's class action claims. The district court granted both of these motions. Later,

at the pretrial conference, the court dismissed with prejudice White's claims against XYZ Corporation.[2]

At trial, the court granted ITT's motion for a directed verdict at the close of all the evidence, concluding that White had failed to make out a case against ITT under any of her theories of recovery. The court submitted White's claim against Aetna to the jury, and the jury, in a general verdict, found for White, awarding her $34,055 compensatory damages and $1,000 punitive damages. Aetna moved for judgment n.o.v. contending that it could not be held liable for breach of contract or fraud because White was an employee at will. The court agreed, and granted Aetna's motion.

White appeals, contending that the district court erred (1) in granting ITT a directed verdict; (2) in granting Aetna a judgment n.o.v.; (3) in dismissing the class action; and (4) in limiting White's pretrial discovery.[3] We consider these contentions in turn.

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2. The court did not indicate the basis for its dismissal of White's claims against XYZ Corporation.

3. White also contends that the district court erred in restricting her cross-examination of ITT's corporate counsel. The foreclosed examination dealt with two issues: first, the amount of control ITT exercised over Aetna, and second, the extent to which ITT sought to comply with Title VII, 42 U.S.C. § 2000e et seq. (1976). Since we assume, for purposes of this appeal, that Aetna was ITT's alter ego and hold nonetheless that White had no claim against ITT, see Part II of text *infra*, it is unnecessary for us to examine the district court's rulings concerning ITT's control over Aetna. As for ITT's compliance with Title VII, White's claim of error is frivolous. At the pretrial conference White advised the court that this was not a Title VII case; thus the court correctly foreclosed White's attempt to litigate Title VII at trial.

II.

White produced no evidence at trial that would have authorized the jury to conclude that she had ever engaged in any contractual dealings with ITT. She offered only a brochure showing Aetna to be "A Nationwide Financial Service of ITT." We will assume for purposes of this appeal, however, that Aetna, with whom White had all her dealings, was indeed ITT's alter ego. Thus, if White had an actionable claim against Aetna for breach of an employment contract or fraud, she also had one against ITT. Conversely, if White had no claim against Aetna, she had none against ITT.

[1, 2] We conclude that White had no claim against Aetna for breach of an employment contract because she was an employee terminable at will, to whom Aetna owed no enforceable duty. Under Georgia law, a hiring indefinite as to time is terminable at the will of either party and creates no executory obligations. 34 Ga.Code § 7-1 (1982); *Murphine v. Hospital Authority of Floyd County*, 151 Ga.App. 722, 261 S.E.2d 457, 458 (1979) (terminable at will employee could not enforce promise to promote according to seniority); *Lowe v. Royal Crown Cola Company*, 132 Ga.App. 37, 207 S.E.2d 620, 623 (1974). In this case, there is no evidence indicating that White's employment was for a definite duration. Indeed, White herself testified that her employment would continue "[f]or as long as I done my duties like I was supposed to. . . ." Clearly, White was an employee terminable at will. As such, any executory promises arising out of the employment relationship, including a promise to reinstate after maternity leave, were wholly unenforceable. Aetna was there-

fore entitled to a directed verdict, and thus judgment n.o.v., on White's contract claim.

[3, 4] Aetna was also entitled to a directed verdict on White's claim that Aetna's failure to reinstate her amounted to fraud. Under Georgia law, if a promise is unenforceable it cannot form the basis of a fraud claim. *See American Standard, Inc. v. Jessee,* 150 Ga.App. 663, 258 S.E.2d 240, 244 (1979); *Ely v. Stratoflex, Inc.,* 132 Ga. App. 569, 208 S.E.2d 583, 584-85 (1974). Since we have already determined Aetna's promise to rehire White to be unenforceable under Georgia law, we must also conclude that such promise cannot form the basis of White's fraud claims. *Accord, Murphine,* 151 Ga.App. 722, 261 S.E.2d 457, 458 (court held employer's unenforceable promise could not form basis of fraud claim).

III.

[5] The district court dismissed, without elaboration, White's class action claims because she failed to satisfy the prerequisites of Fed.R.Civ.P. 23. White contends that the dismissal was error because she adduced sufficient facts to satisfy the prerequisites of Rule 23 or, alternatively, was precluded from doing so because the district court prevented her from discovering such facts.

White occupies a procedural posture we[4] have faced on several occasions: a plaintiff brings both an individual and class action; the class action is dismissed pretrial; he loses his individual claim at trial and then appeal the dis-

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4. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to September 30, 1981.

missal of his class action. *See Walker v. Jim Dandy Co.*, 638 F.2d 1330, 1335 (5th Cir. 1981); *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir. 1981) (en banc); *Shepard v. Beaird-Poulan, Inc.*, 617 F.2d 87 (5th Cir. 1980); *reh'g granted*, 638 F.2d 909 (5th Cir. 1981); *Armour v. City of Anniston*, 597 F.2d 46 (5th Cir. 1979), *vacated*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 774 (1980), *remanded to district court*, 622 F.2d 1226 (5th Cir. 1980).

On each of these occasions, we have remanded the case to the district to determine (1) the presence of a live controversy involving the proposed class, and if one is present, (2) whether, pursuant to Rule 23, the action is appropriate for class certification and the appellant is a proper representative of the proposed class (or if not, whether there exists an appropriate class representative who can be substituted for the appellant). We see no reason to deviate from such procedure in this case. We therefore remand this case to the district court for further proceedings on the class issue.

AFFIRMED in part and REMANDED in part for further proceedings.

UNITED STATES COURT OF APPEALS

Eleventh Circuit
Office of the Clerk
56 Forsyth Street, N.W.
Atlanta, Georgia, 30303

January 13, 1984

In replying give number
of case and names of parties

Spencer D. Mercer
Clerk

Mr. Girard W. Hawkins
Clerk

U.S. District Court
P.O. Box 128
Macon, GA 31202

No. 81-8000 - DARLENE R. WHITE -vs- I.T.T., ETC. (U.S.D.C. #CV79-0165)

Dear Mr. Hawkins:

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as an for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

( ) Original record on appeal or review. TO BE RETURNED LATER

( ) Original exhibits. TO BE RETURNED LATER

(XX) Bill of Costs approved by this Court.

(XX) Order DENYING a stay of mandate.

Sincerely,

SPENCER D. MERCER, CLERK

By: Shelda V. Harris
Deputy Clerk

cl.

w/Judgement: Mr. James P. Patrick
Mr. Kennth L. Funderburk
Ms. Gloria J. Shanor
Mr. Jacob Beil

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 81-8000

D.C. Docket No. 79-0165

Darlene R. WHITE, individually and on behalf of the class, Plaintiff-Appellant,

v.

I.T.T., a Corporation; International Telephone and Telegraph Corporation; XYZ Corporation, d/b/a I.T.T., et al., Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

(Issued as Mandate: January 13, 1984)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED IN PART; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 31, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-8000

(Filed January 1, 1984)

DARLENE R. WHITE, individually and on behalf of the class,

Plaintiff-Appellant,

versus

I.T.T., a Corporation; INTERNATIONAL TELEPHONE and TELEGRAPH COR-

PORATION: XYZ Corporation, d/b/a I.T.T., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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ORDER:

(✓) The motion of appellant for (✓) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant for ( ) stay ( ) recall and stay of the issu-

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-8000

(Filed January 1, 1984)

DARLENE R. WHITE, individually and on behalf of the class,

Plaintiff-Appellant,

versus

I.T.T., a Corporation; INTERNATIONAL TELEPHONE and TELEGRAPH CORPORATION; XYZ Corporation, d/b/a I.T.T., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

ORDER:

x The motion of appellant for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

• • •

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
Eleventh Circuit

Office of the Clerk
56 Forsyth Street, N.W.
Atlanta, Georgia, 30303

December 12, 1983

In replying give number
of case and names of parties

Spencer D. Mercer
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 81-8000—DARLENE R. WHITE-vs- I.T.T., etc.

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

By: SHELDA V. HARRIS
Deputy Clerk

Mr. Kenneth L. Funderburk
Mr. James D. Patrick
Ms. Gloria J. Shanor
Mr. Jacob Beil

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-8000

(Filed December 12, 1983)

DARLENE R. WHITE, individually and on behalf of the class,

Plaintiff-Appellant,

versus

I.T.T., a Corporation; INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION: XYZ Corporation, d/b/a I.T.T., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 31, 11 Cir., 1983, — F.2d —).

(December 12, 1983)

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having

voted in favor of it, rehearing en banc is DENIED.
ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
United States Circuit Judge

Atlanta District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Citizens Trust Building, Suite 1150
75 Piedmont Avenue, N.E.
Atlanta, Georgia 30335

July 1, 1983

Mr. James D. Patrick
Attorney at Law
831 Second Avenue
Columbus, Georgia 31901

Re: Charge Number: 041791794
Darlene White vs. Aetna Finance Company and International Telephone and Telegraph Corporation (ITT)

Dear Mr. Patrick:

Thank you for your recent letter reference the above captioned matter.

I found on reading your letter that there appears to have been some misunderstanding of what you expected me to do growing out of the conversation we had. Thus I think I need to clear the air for the record.

You also raised again the matter of right-to-sue notice of February 25, 1983 carrying an indication of "No jurisdiction." Under the asterisk it stated, "Court case previously filed (CA 79-165 Cols.)" In addition, this office had

determined that the charge had not been timely filed in the first instance thus defeating jurisdiction. Since, however, the court suit had been filed—supposedly on substantially the same issues—it was unnecessary to take further action.

I sincerely regret any delays attendant to the whole of these matters. Further I want you to understand that our review of all aspects of action in this office surrounding the case leads me to believe it has been professional and reasonably proficient.

Best wishes for a good summer.

Sincerely,

/s/ Donald L. Hollowell
Regional Attorney

(SEAL)

Equal Employment Opportunity Commission
NOTICE OF RIGHT TO SUE
(Dismissal)

TO:

Darlene R. White
2900 4th Avenue
Phenix City, Alabama 36867

FROM:

Atlanta District Office
Tenth Floor
Citizen Trust Bank Bldg.
75 Piedmont Avenue, N.E.
Atlanta, Georgia 30303

Charge Number 041791794.

EEOC Representative Betty A. Adams, District Director.

Telephone Number (404)221-6091.

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

*(X) No jurisdiction, therefore the Commission has no authority to process your charge further.

( ) No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

( ) You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 90 days in which to respond to our final written request.

( ) The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

( ) The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM

THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U. S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. *Your request to the U. S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U. S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ G. Duke Beasley (for)
(Typed Name and Title of EEOC Official)

BETTY A. ADAMS
District Director

*Court case previously filed (CA 79-165 Cols.)
February 25, 1983
(Date)

James D. Patrick

cc: Donald R. Stacy, Attorney
Aetna Finance Company

EEOC Form 161
Sep 77

Civil Action No. 79-165-COL
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DARLENE R. WHITE,
Plaintiff

v.

AETNA FINANCE COMPANY,
Defendant

ORDER ON DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

(Filed November 25, 1981)

The case above identified having come on for trial by jury and the jury having returned a verdict in favor of the Plaintiff on September 24, 1981, and judgment having been entered thereon on the same date, the Defendant Aetna Finance Company has now filed a motion with the Court to set aside the verdict and judgment above referred to and to enter judgment in favor of the Defendant.

At the close of all of the evidence presented by the Plaintiff the Defendant made a motion for a directed verdict, which motion was renewed by the Defendant at the close of all the evidence in the case. These motions were not ruled upon by the Court at the time made, the Court specifically reserving a ruling in regard thereto, and the Defendant's motion for judgment notwithstanding the verdict which is now before the Court for consideration was made within the time prescribed by the applicable rule and is properly before the Court for consideration. In the alternative, the Defendant moves the Court to set aside the jury's verdict and the judgment entered thereon

and grant the Defendant a new trial. This alternative motion is also properly before the Court for consideration. No transcript of the trial proceedings has been prepared, but because of the Court's familiarity with this case and clear recollection of the trial proceedings no such transcript is necessary to enable the Court to make a ruling on the pending motion.

It is the Court's opinion that the Defendant's motion for judgment notwithstanding the verdict should be sustained for all of the reasons asserted by the Defendant in the body of the Defendant's motion which relate to the motion for judgment notwithstanding the verdict. Accordingly, it is ordered that the verdict of the jury returned in this case as it relates to the Defendant Aetna Finance Company and the judgment entered thereon be and they are hereby set aside and it is directed that judgment be entered in favor of the Defendant Aetna Finance Company.

In the alternative, if it should hereafter be determined on appeal that the action of this Court in sustaining the Defendant's motion for judgment notwithstanding the verdict is for any reason improper, then, in that event, it is directed that the verdict and judgment heretofore entered in this matter as above referred to be set aside and the Defendant Aetna Finance Company be granted a new trial for all of the reasons urged by the Defendant in the body of the Defendant's motion which relate to the alternative motion for a new trial.

IT IS SO ORDERED this 25th day of November, 1981.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. 79-165-COL.
IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

DARLENE R. WHITE, Plaintiff

v.

AETNA FINANCE COMPANY

JUDGMENT

(Filed November 30, 1981)

This action came on for trial before the Court and a jury, Honorable J. Robert Elliott, U.S. District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the plaintiff and judgment having been entered on September 24, 1981 in accordance with the jury verdict.

On October 1, 1981 the Defendant filed his Motion for Judgment notwithstanding the verdict of the jury and the Court entered an Order on November 25, 1981 sustaining the motion of the Defendant and directing that judgment be entered in favor of the defendant.

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of the defendant Aetna Finance Company.

GIRARD W. HAWKINS, CLERK

By /s/ Louie G. Broadwell
Deputy Clerk

[Judgment on Jury Verdict CIV 31 (7-63)]

Civil Action File No. 79-165-Col.

UNITED STATES DISTRICT COURT
For The
MIDDLE DISTRICT OF GEORGIA-COLUMBUS DIVISION

DARLENE R. WHITE

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION

JUDGMENT
(Filed September 24, 1981)

This action came on for trial before the Court and a jury, Honorable J. Robert Elliott, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged, at the direction of the Court, that the Plaintiff Darlene R. White take nothing, that the action be dismissed on the merits, and that the Defendant International Telephone & Telegraph Corporation recover of the Plaintiff, Darlene R. White, his costs of action.

Dated at Columbus, Georgia, this 24th day of September, 1981.

GIRARD W. HAWKINS
Clerk of Court

By /s/ Louie G. Broadwell
Deputy Clerk

Civil Action File No. 79-165-COL.

UNITED STATES DISTRICT COURT
For The
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DARLENE R. WHITE

vs.

AETNA FINANCE COMPANY

JUDGMENT
(Filed September 24, 1981)

This action came on for trial before the Court and a jury, Honorable J. Robert Elliott, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the Plaintiff, Darlene R. White recover of the Defendant Aetna Finance Company, the sum of Thirty-five Thousand, fifty-five and 00/100 ($35,055.00) with interest and costs as provided by law.

Dated at Columbus, Georgia, this 24th day of September, 1981.

GIRARD W. HAWKINS
Clerk of Court

By /s/ Louie G. Broadwell
Deputy Clerk

Civil Action File No. 79-165-COL

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DARLENE R. WHITE,

Plaintiff,

v.

AETNA FINANCE COMPANY and
INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,

Defendants.

ORDER

The above-captioned action having come specially before the Court for pretrial conference and hearing upon various pending motions, after hearing argument of respective counsel for Plaintiff, Defendants, AETNA FINANCE COMPANY ("AETNA") and International Telephone and Telegraph Company ("ITT") and considering the record and pleadings, it is hereby ordered as follows:

(1) Plaintiff's counsel has unequivocally stated at the pretrial that Plaintiff's action is a simple contract and fraud case and specifically is not a "TitleVII" (42 U.S.C. §2000E, *et seq.*) case. Accordingly, no further claims of alleged Title VII violations by any Defendant will be made by Plaintiff in this case;

(2) Plaintiff's proposed pretrial order is incomplete and must be supplemented on or before September 4, 1981, as follows:

(A) Plaintiff shall provide Defendants with a complete and specific list of her proposed trial exhibits. Defendants shall promptly thereafter indicate any of such proposed trial exhibits as to which they assert an authenticity objection;

(B) Plaintiff shall provide Defendants with a complete and specific list of her contentions of fact and law on liability;

(3) Plaintiff's motion for partial summary judgment is denied;

(4) Plaintiff's motion to make defendants one, filed on or about May 23, 1980, is denied;

(5) Plaintiff's request for sanctions against ITT's counsel contained in her "Special Response of Plaintiff to Portions of ITT's Brief In Support of its Motion for a Protective Order filed on or about May 22, 1980, is denied;

(6) "XYZ Corp." is dismissed with prejudice as a Defendant from this case, with costs to be taxed after conclusion of the action;

(7) The remaining two Defendants correctly named are "Aetna Finance Company" and "International Telephone and Telegraph Corporation." The pleadings shall be so amended and styled in the future;

(8) The parties may file any requests to charge the jury on the day the trial of the case begins;

(9) Defendants' motion to compel discovery is granted and Plaintiff shall file and serve (Mr. Beil by hand, Mr. Ashe by mail) full and complete answers and responses as set forth below on or before 5:00 p.m. on September 4, 1981:

(A) Plaintiff shall provide Defendants with executed authorizations (in the form attached hereto) to obtain, at Defendants' expense, copies of her medical records from January 1, 1975 through time of trial;

(B) Plaintiff shall provide Defendants with copies of her and her husband's joint state and federal income tax returns for the years 1975 through 1980. In the event any such return is not within the care, custody or control of Plaintiff or her husband, Plaintiff and her husband shall supply Defendants with executed authorizations (in the form attached hereto) to obtain copies of such returns at Defendants' expense;

(C) Plaintiff shall fully and completely answer ITT's interrogatory #6, stating the dates of each application and describing fully and specifically all other efforts made by Plaintiff to seek employment since September, 1977 other than these previously supplied in answer to said interrogatory #6 and any information concerning unemployment insurance benefits applied for or received by Plaintiff since September, 1977. In the event such information is not in Plaintiff's possession, Plaintiff shall supply Defendants with executed authorizations (in the form attached hereto) to obtain copies of such information at Defendant's expense.

(D) Plaintiff shall fully and completely answer ITT's interrogatory #7;

(E) Plaintiff shall fully and completely answer ITT's interrogatory #19;

(F) Plaintiff shall fully and completely answer ITT's interrogatory #23;

(G) Plaintiff shall fully and completely answer ITT's interrogatory #32;

(10) Defendants may notice the continuation and completion of Plaintiff's deposition if they so desire after receipt and review of the information and documents to be supplied by Plaintiff as set forth above;

(11) No further depositions shall be noticed or taken by Plaintiff without prior order of this Court upon application and opportunity for Defendants to object;

(12) The case will not appear on a trial calendar before the week of September 21, 1981. The Court antici-

pates that it will be tried either the week of September 21 or the week of September 28, 1981;

(13) Plaintiff's counsel shall take such steps as may be necessary to ensure that Defendant, ITT's counsel is served with copies of pleadings and all mail at its correct address, which address is currently: Paul, Hastings, Janofsky and Walker, Suite 1100, 230 Peachtree Street, NW, Atlanta, Georgia 30303.

(14) All claims for attorneys' fees and litigation expenses are reserved for ruling after trial on the merits.

SO ORDERED this _____ day of August, 1981.

JUDGE, UNITED STATES DISTRICT COURT, MUSCOGEE COUNTY, GEORGIA

JACOB BEIL, ATTORNEY FOR AETNA FINANCE COMPANY

R. LAWRENCE ASHE, JR., ATTORNEY FOR INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

APPROVED AS TO FORM:

JAMES D. PATRICK

J. PHILIP DAY

KENNETH L. FUNDERBURK

CASE No. _____

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

DARLENE R. WHITE, individually and
on behalf of the class,

Plaintiff,

vs.

I.T.T., a corporation; INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION; XYZ Corporation d/b/a I.T.T., whose corporate name is otherwise unknown but which will be added by amendment and all of its parts, wholly owned subsidiaries, under its direction and contral, by whatever name known, including AETNA FINANCE COMPANY,

Defendant.

COMPLAINT

Comes now the Plaintiff in the above styled cause and would show unto the Honorable Court the following facts for the basis of relief:

JURISDICTION

1. Plaintiff, Darlene R. White, is a citizen of the State of Alabama and sues on behalf of herself and a class of persons similarly situated, as set forth in the remainder of this Complaint, which class may be made up of citizens of the State of Alabama, citizens of the State of Georgia or other diverse States.

2. Defendant is named I.T.T., a corporation or International Telephone and Telegraph Corporation and is a conglomerate corporation operating within the State of Georgia under one or more of its subsidiary names, including the name of Aetna Finance Company. Aetna

Finance Company is a subsidiary of I.T.T. and is a Delaware corporation doing business in Columbus, Muscogee County, Georgia, and the Defendant, by all of its names, is subject to the jurisdiction of this Court. When the word Defendant is used herein, it refers interchangeably to I.T.T. (International Telephone and Telegraph Co.) and all its subsidiaries, XYZ Corporation d/b/a I.T.T., is the same corporation whose name is otherwise unknown but which will be added by amendment, including all of its parts, wholly owned subsidiaries, under its direction and control, and by whatever name known, including Aetna Finance Corporation.

3. The action arises under 42 U.S.C. 2000e and 42 U.S.C. 1983, as hereinafter more fully appears. The jurisdiction of the Court over the cause of action is based on diversity of citizenship and the Plaintiff avers that the amount of damages involved exceeds Ten Thousand Dollars ($10,000.00).

FACTS

A. SUMMARY OF FACTS

4. This summary of facts is applicable and incorporated into the subsequent averments by Plaintiff.

(a) Plaintiff's initial date of employment by Defendant was January 28, 1975.

(b) From initial employment date, and until September 7, 1977, Plaintiff was employed by Defendant at its subsidiary office known as Aetna Finance Company in Columbus, Muscogee County, Georgia.

(c) As of September 7, 1977, Plaintiff was earning Seven Thousand Four Hundred Forty-one Dollars ($7,441.00) per year as a Secretary-Cashier in her employ with Defendant.

(d) Prior to September 7, 1977, Plaintiff was pregnant, and such physical condition of Plaintiff was known by Defendant.

(e) On or about September 12, 1977, Plaintiff was required to take a leave of absence for the remaining term of her pregnancy and was required to sign a leave of absence form (Exhibit "B"). Maximum period for leave was set at six (6) months in accordance with Defendant's company policy.

(f) At the time Plaintiff left on maternity leave, Defendant had already hired a permanent, full time replacement for Plaintiff's position.

(g) Plaintiff continued to pay insurance premiums during her leave of absence and received pregnancy benefits under the terms of the insurance policy.

(h) At the expiration of the six (6) month maternity leave of absence, and on or about March 13, 1978, Plaintiff notified Defendant that she would be returning to work and Defendant notified Plaintiff that she would not be rehired. This notification was by letter dated March 13, 1978, by Defendant employee John Hanson, who was acting within his line and scope of employment, and hand delivered to Plaintiff by the same employee. A copy of said letter is attached hereto as Exhibit "C".

(i) On or about September 1, 1978, some six (6) months after Plaintiff had exercised her rights and at-

tempted to return to her job, the Defendant hired a permanent employee to fill a position similar to the one held by the Plaintiff in the same office and one she was qualified to hold, and at said time the Defendant did not rehire or attempt to rehire the Plaintiff.

(j) In March, 1979, Defendant hired a person to fill a Secretary-Cashier position at the same office where Plaintiff had been employed without making a bona fide offer to rehire Plaintiff.

B. FACTS SPECIFIC TO TERMS OF EMPLOYMENT CONTRACT(S)

5. That prior to September 7, 1977, Plaintiff was pregnant, and such physical condition of Plaintiff was known by the Defendant. Defendant's written personnel policies required Plaintiff to take a leave of absence for such pregnancy. A copy of the employment contract governing maternity leave is attached hereto as Exhibit "A" and is incorporated herein by reference.

6. At all times material to this case, the Defendant has employed women under its employment contract known as M11.063, the same being attached hereto as Exhibit "A". The Plaintiff, as well as all those similarly situated with her, were hired under this policy.

7. Plaintiff avers that she, and all those similarly situated with her, entered into a contract of employment with the Defendant and as part of the terms of said contract, the Defendant agreed according to Exhibit "A" as follows:

> "a pregnant employee may continue working for as long as she desires before delivery and then be grant-

ed a leave of absence at the end of which she may return to her old position or another of similar content and pay." (Exhibit "A")

8. Plaintiff avers that the promise by Defendant constituted part of the consideration for the Plaintiff's accepting a placement with the Defendant.

C. FACTS SPECIFIC TO ADHESION PROVISIONS OF LEAVE OF ABSENCE FORM (STANDARD REHIRING CONTRACT)

9. Plaintiff further avers that she and all those of a class similarly situated, were required by Defendant to execute a leave of absence form, or be terminated without employee benefits. A copy of the leave of absence form constituting the common and standard rehiring contract is attached hereto as Exhibit "B". (Said leave of absence form is also referred to as the "standard rehiring contract.") Said leave of absence form did not conform to the terms of the initial employment contract as set out in Exhibit "A" and is in derogation of the terms of said initial employment contract. Said "standard rehiring contract" contradicted the initial employment contract by providing that Plaintiff's job would be returned only "if an opening then exists" after the child is born. Plaintiff avers that insofar as the terms of Exhibit "B" are in derogation of Exhibit "A", that it constitutes an adhesion contract.

10. Plaintiff avers that in regard to Exhibit "B" so far as it deviates from the terms of the initial employment contract as set out in Exhibit "A", the same was unconscionable and the Plaintiff had no bargaining power with regard to said term or terms being in said leave of ab-

sence form; that Plaintiff, and those similarly situated with her, had no meaningful choice as to whether to enter into said leave of absence containing said term, except immediate termination from said employment without employee benefits. Plaintiff further avers that she, and all those similarly situated, were required to sign the said Exhibit "B" form while pregnant; that at the time the Plaintiff, and those similarly situated, were required to sign Exhibit "B" Defendant had no present intention of complying with the initial employment contract as expressed in Exhibit "A".

11. Plaintiff avers that the Defendant forced the Plaintiff, and all those similarly situated with her, to enter into a written contract which is Exhibit "B". Exhibit "B" is the common and only form signed by all persons similarly situated with the Plaintiff who take a pregnancy leave. Said form (Exhibit "B") was in use at the time of the Plaintiff's initial employment with the Defendant and has been in constant, uninterrupted and unchanged use from 1972 to the present date. That Plaintiff, and all others similarly situated with her, were not informed of the contents of Exhibit "B" upon their initial employment with the Defendant; rather, Plaintiff and all those similarly situated with her, were only informed of the terms of the contract on pregnancy leave as expressed by Exhibit "A".

12. Plaintiff avers that the provisions of the "standard rehiring contract" (Exhibit "B") allow rehiring only if an opening exists are a violation of Federal law, 42 U.S.C. 2000e, and, therefore, illegal and those provisions constitute a nullity.

D. FACTS SPECIFIC TO STANDARD REHIRING CONTRACT

13. By the express terms of Exhibit "B" the Defendant obligated itself to Plaintiff, and all those similarly situated, as follows:

> "If there are no positions available at the time I am scheduled to return to work, I understand that I will be reemployed in the first position which becomes available for which I am qualified."

That this obligation became a voluntary and affirmative obligation resting solely with the Defendant and as part of an adhesion contract the Defendant is estopped from disclaiming the affirmative duty to rehire. That because of the adhesive nature of the leave of absence contract, forced upon the Plaintiff and all those similarly situated, the entire contract of employment must be most strongly construed against the Defendant, as being the drafter and perpetrator of Exhibit "B".

14. The "standard rehiring contract" (Exhibit "B") has been in use without change since 1972 through the date of filing this law suit in 1979.

15. Plaintiff avers that the initial employment contract and the "standard rehiring contract" (insofar as the same is not in conflict with Exhibit "A") constitute the employment contract between the Plaintiff and all those similarly situated and the Defendant, the same creates a continuous duty on the part of Defendant to rehire Plaintiff upon the termination of pregnancy leave.

BREACH OF CONTRACT CLAIMS

16. *Claim I.* Plaintiff avers that the Defendant breached the employment contract on March 13, 1978, when the Plaintiff notified Defendant that she would be returning to work, and Defendant notified Plaintiff that she would not be rehired. Plaintiff was notified that she would not be rehired on March 13, 1978, by letter hand delivered by John Hanson, an employee of Defendant acting within his line and scope of employment. A copy of said letter is attached hereto as Exhibit "C".

17. *Claim II.* Plaintiff further avers that the defendant breached the employment contract to rehire her when, on September 12, 1978, the Defendant hired an employee to fill a position similar to the one held by the Plaintiff, and one she was qualified to hold, and at said time the Defendant did not rehire or attempt to rehire the Plaintiff as required under their affirmative duty as expressed in Exhibit "B".

18. *Claim III.* The employment contract to rehire was further breached in March of 1979, when the Defendant hired a person to fill the Secretary-Cashier position without making a bona fide offer to rehire the Plaintiff as required under the affirmative duty as expressed in Exhibit "B".

FRAUD CLAIMS

19. *Claim 1.* FRAUD IN THE INCEPTION OF INITIAL EMPLOYMENT. Plaintiff herein incorporates

paragraphs 1 through 15 regarding the factual allegations of the employment contract. Plaintiff would further show unto the Honorable Court that she, and all those similarly situated with her, relied upon the Defendant's agreement to return her to her previous job, after her pregnancy was over as set out in Exhibit "A". By the terms of Exhibit "A", the Plaintiff was granted by the Defendant the absolute right under the employment contract to have her old job back, or an equivalent job. Plaintiff avers that the fraud which is common to her, and to all those similarly situated with her, was the representation upon initial hiring that they would be rehired to their old position or one equivalent thereto upon the termination of pregnancy. That upon becoming pregnant, the Defendant required the Plaintiff and all those similarly situated, to enter an adhesion contract (Exhibit "B") which took away the right as expressed in the initial employment contract (Exhibit "A") and further, the adhesion contract placed upon the Defendant, in each of these cases the affirmative duty to rehire at the first available opportunity without time limitation. Such duty is required by Federal law 42 U.S.C. 2000e. That at the time both representations were made by the Defendant to the Plaintiff, and all those similarly situated, they were made with the intent not to honor these obligations, therefore made with fraudulent intent.

20. *Claim II.* FRAUD IN THE EXECUTION OF LEAVE OF ABSENCE FORM.

(a) Plaintiff would further show unto the Honorable Court that the Defendant did not intend to rehire her when on September 12, 1977, the Defendant required

the Plaintiff to execute the adhesion contract as shown by Exhibit "B". That Defendant hired a full time employee to permanently replace the Defendant prior to the execution of Exhibit "B" by the Plaintiff and Defendant. That the Defendant is guilty of fraud and misrepresentation in that Defendant held out to the Plaintiff that she would be rehired to her old position or an equivalent position upon the termination of her leave, when at the time this representation was made, the Defendant intended not to place her in her old position or an equivalent job.

(b) The Plaintiff avers that she relied upon these representations made by the Defendant to her detriment.

(c) Plaintiff avers that the Defendant further represented to the Plaintiff, and all those similarly situated with her, as shown by Exhibit "B", that the Defendant would assume the affirmative duty to rehire the Plaintiff without time limitations for the first available job.

(d) That the Plaintiff relied upon the representation which was forced upon her by the Defendant to her detriment.

(e) Plaintiff avers that at the time the Defendant made the representation to her regarding rehiring, as set out in Exhibit "B", Defendant had no present intention of fulfilling the representation in that the Defendant had already hired a full time, permanent replacement of Plaintiff and had no intention of ever rehiring the Plaintiff.

(f) Plaintiff would further show unto the Court that she paid her insurance premium for employee benefits and was forced to sign the leave of absence form in order to be eligible for the rights under her insurance program and that she continued to pay for the insurance during her leave.

(g) Plaintiff further avers that Defendant in March of 1978, fraudulently denied the Plaintiff the right to return to her old position or one thereto equivalent.

CONTINUING FRAUD

21. *Claim III.*

(a) Plaintiff adopts all previous allegations of fraud in her claim of continuing fraud.

(b) Plaintiff would show unto the Honorable Court that the Defendant continued the fraud upon the Plaintiff when in September of 1978, an opening existed for which the Plaintiff was qualified and another person was hired, without fulfilling the affirmative duty to rehire the Plaintiff.

(c) Plaintiff would show unto the Honorable Court that the fraud was further continued upon her when in March of 1979, the Plaintiff did not rehire the Defendant to her old job when such a position was available. Plaintiff avers that the Defendant did not honor the duty to rehire her, but embarked upon a charade of "considering" her for the job and subsequently hiring someone else for the position. A copy of a letter is attached hereto as Exhibit "D".

(d) Plaintiff avers that she relied upon each of these representations made by the Defendant to her

detriment. Only the Defendant had knowledge of the job openings and Plaintiff relied on Defendant for notification of openings.

DEFINITION OF PLAINTIFF'S CLASS

22. Plaintiff brings this action on behalf of herself and all members of a class composed of the following:

(a) All females who were employed by Defendant from March 2, 1972, to date under rule M11.063 as shown by Exhibit "A", which held out to said employees, upon employment, that after the expiration of maternity leave, they would have the right, at their option, to return to their old job or its equivalent with the Defendant, and who were not reemployed with the Defendant at the expiration or termination of their leave. Said class is further defined as being composed of those females who executed the leave of absence form like the one which is attached hereto as Exhibit "B", which is in violation of Federal law, 42 U.S.C. 2000e and 42 U.S.C. 1983.

(b) Plaintiff avers that said class is so constituted and is so numerous that joinder of all members is impracticable.

(c) Plaintiff further avers that there are questions of law or fact which are common to the class and that her claim against the Defendant contains the following parts:

(1) Breach of initial employment contract (Exhibit "A")

(2) Breach of standard rehiring contract (Exhibit "B")

(3) In the alternative, breach of the employment contract

(4) Fraud in the inception of the initial employment contract (Exhibit "A")

(5) Fraud in the execution of the rehiring contract (Exhibit "B")

(6) Continuation of fraud

(7) Violation of Federal law

All of these claims, separately and severally, are typical of all members of the class and that she is an adequate representative to pursue said claims.

23. Plaintiff further avers that the same rules, leave of absence form and actions toward the Plaintiff and the members of her class are uniform throughout the United States of America and that the class of persons reside in each of the states of the United States of America, and that the class action should be granted on a national basis.

24. This action is brought under 23(b)(1)(13)FRCP and Plaintiff avers that the prosecution of separate actions by individual members of Plaintiff's class would create adjudications or which would be dispositive of the interest of members not parties to the adjudication or would subsequently impair or impede their ability to protect their interest.

25. Since each member of Plaintiff's class has been treated in virtually the same manner by the Defendant, the only difference being the pay scale of each member

of the class and the length of time from the date of release from the company to the present date, the uniform practice necessitate's an action of this type so as not to prejudice the individual rights of all others in the class and therefore this action is the best manner in which to handle those claims and is superior to all other forms of actions available to members of Plaintiff's class.

26. The Defendant has acted on grounds generally applicable to the class thereby making injunctive and declaratory relief appropriate with respect to the class as a whole.

27. Each member of the class has common bonds with the Plaintiff;

(a) Employment with the Defendant under terms of Exhibit "A"

(b) Execution of the leave of absence form (Exhibit "B")

(c) Failure to rehire after the termination of the leave of absence.

Plaintiff avers that these acts of fraud, reliance upon the representations by Defendant, and the source of damages, is common to all members of the class.

28. Plaintiff avers that, upon information and belief, the Plaintiff's class will number ten thousand (10,000) or more members and the damages sustained by the class will exceed Five Million Dollars ($5,000.-000.00).

DEPRIVATION OF RIGHTS

(CLAIM)

29. Plaintiff herein incorporates all of the preceding factual allegations set forth in this complaint.

Plaintiff would further show the Honorable Court that she, and all those similarly situated with her, were deprived of equal protection under the Constitution and her rights in violation of Federal Law, 42 U.S.C. 1983, when she was not allowed to return to her previous job after her pregnancy. Defendant deprived Plaintiff of equal protection and rights through regulation, custom and usage which was manifested by breach of contract, enforcing an illegal contract and fraud as previously set forth in this complaint.

WHEREFORE, Plaintiff, individually and in her representative capacity demands judgment against the Defendant, as follows:

(a) That the Court determine that a class action may be maintained by establishing and certifying the Plaintiff's class as a national class, or in the alternative, a regional or state class;

(b) In order to protect members of the class, that the Court will require a notice to be given in such manner as the Court shall direct; and

(c) That the Court enter a judgment against Defendant as to Plaintiff and each member of her class for all damages arising out of the charges set forth above for breach of contract, which shall be determined by the salary due Plaintiff, and each member of the class, from the date the leave of absence was signed to the present date; and

(d) That the Court award punitive damages in the amount of Fifty-two Million Dollars ($52,000,000.00) for the wilfull and knowing fraud and deception committed against Plaintiff's class as set forth above;

(e) That Plaintiff and Plaintiff's class be awarded the cost of this litigation, including reasonable attorney's fee; and

(f) That the Court grant Plaintiff and Plaintiff's class such other and further relief as may be just and proper.

(g) That the Court award compensatory and punitive damages in the amount of Fifty-two Million Dollars ($52,000,000.00) for the deprivation of rights of Plaintiff and Plaintiff's class as set forth above.

LARRY TAYLOR
JAMES D. PATRICK
PHILLIPS and FUNDERBURK

By /s/ Kenneth L. Funderburk
Post Office Box 1025
Phenix City, Alabama 36867
Attorneys for Plaintiff

Plaintiff demands trial by jury.

/s/ Kenneth L. Funderburk
Of Counsel

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

DARLENE R. WHITE,

Petitioner,

vs.

ITT AND INTERNATIONAL
TELEPHONE AND TELEGRAPH
COMPANY, and its wholly
owned subsidiaries, by
whatever name known,
including Aetna Finance
Company,

Respondents.

SPECIAL APPENDIX

Prefatory Statement

The attached documents are particular trial exhibits and excerpts from the voluminous ITT-Aetna Management Manual which contained the written promises to employees and set out the various terms and conditions of the employment relationship. Compiled and denoted as a Special Appendix for the Eleventh Circuit's use, Petitioner has deleted some portions from that submitted to the Eleventh Circuit, and hereby submits this redacted version of that Special Appendix as part of the Appendix in the Petition for Writ of Certiorari.

INDEX SPECIAL APPENDIX

"EXHIBIT P"

AETNA FINANCE
REQUEST FOR LEAVE OF ABSENCE

I would like to apply for a leave of absence for the following reason: Because I am advised by my Doctor to take a leave of absence for the remaining of my pregnancy.

Beginning Date Sept. 15, 1977 (First scheduled work day absent)

Date of Expected Return March 15, 1973 (First day returned to work) (not to exceed 6 months)

I understand that if I fail to return to work on the above-indicated date or fail to notify the Company in writing prior to said date, that I wish to extend my leave of absence for an additional period of time, my employment will be terminated. I further understand that even though I may request an extension of my leave, it is within the sole discretion of the Company whether and for how long such an extension is granted to me.

When I return to work at the expiration of my leave of absence, I may return to the position I held prior to this leave of absence or to another position comparable in function and compensation; if an opening then exists. If there are no positions available at the time I am scheduled to return to work, I understand that I will be re-employed in the first position which becomes available for which I am qualified.

Employee's Signature: Darlene R. White
Date: Sept. 7, 1977
Manager's Signature: John M. Hanson
Office: 9/7/77

"EXHIBIT C"
AETNA FINANCE

March 13, 1978

Aetna Finance Company
A Nationwide Financial Service of ITT
3300 Victory Drive
P.O. Box 3488
Columbus, Georgia 31903
(404) 687-3150

To Whom It May Concern:

Darlene R. White having taken a leave of absence for maternity for six months ending 3/15/78 reported this date to return to work.

At present no openings exist at the office now and Aetna is unable to re-employ Darlene White at this time.

AETNA FINANCE COMPANY
/s/ John Hanson, Manager

"EXHIBIT D"

AETNA FINANCE

March 16, 1979

Aetna Finance Company
A Nationwide Financial Service of ITT
3300 Victory Drive
P.O. Box 3488
Columbus, Georgia 31903
(404) 687-3150

Mrs. Darlene White
2900 4th Avenue
Phenix City, Ala. 36867

Dear Darlene:

We have a secretary/cashier position open immediately. If you wish to be considered for this position you must apply not later than March 23, 1979.

Sincerely,

/s/ John Hanson
Regional Manager

M5.0223 *The Employment Contract*

Under the terms of this contract, the employee agrees to observe certain written provisions embodied in the contract in return for a stipulated consideration. The employee should be given adequate opportunity to read over the contract completely and to be sure he or she understands all of its provisions. Careful explanation should be made of any items on which a question arises. Only one copy is necessary, and must be executed on the employee's first day of work.

1. *Instructions for Filling Out the Contract:*

   Paragraph 3 - Insert the agreed upon monthly salary and, if applicable, the amount of car allowance agreed upon.

   Paragraph 4 - Insert the employee's starting date.

   Paragraph 22 - Have employee enter Social Security Number.

   Paragraph 25 - Have employee enter name of beneficiary and that individual's relationship to employee. This must be completed, even though

the employee may not choose to be covered by company insurance.

Signing & Witnessing - Have employee sign on the appropriate line; Manager witnesses signature, entering date and signature.

NOTE: Do not fill in the "Acceptance" portion, lower right-hand corner. This must be signed in the Home Office by the Personnel Director.

2. *Transmittal* - Attach to the PAR set which is sent intact to Home Office Personnel.

M5.0224 *Insurance Forms*

There are four insurance forms that must be completed by all eligible new employees on their first day of employment. They are: the Group Life Insurance and Major Medical Application Card, the Voluntary Accident Insurance Application, the Family Life Enrollment Form, and the Group Insurance Census and Record Card, which is the application for salary continuance coverage.

1. *Group Life Insurance and Major Medical Program* - Employees are eligible for the very low cost life insurance and hospitalization benefits, upon the completion of one full month of active service with Aetna. The amount of life insurance and major medical benefits for which employees are eligible and the schedule of monthly premiums for this coverage may be found in the YOU Booklet—"Total Insurance Program." The Manager should discuss this thoroughly with the new employee and answer any questions.

   To enroll for this insurance and hospitalization benefit, it is only necessary for the employee to complete an application, filling in *only* the unshaded area. Applica

When the request has been approved, all parties concerned will be notified. Group, hospital and other insurance may be continued through authorized periods up to six months, provided the employee makes arrangements to pay the premiums.

If an employee does not return to work per the scheduled (date of return) or notify the company, in writing, that an extension is desired, the employee will be terminated retroactively as of the noted "date of last work."

M11.063 *Maternity Leave*

A six month Leave of Absence for Maternity purposes will be granted only to those pregnant employees fully intending to return to work after the birth of their child. A PAR, accompanied by a Leave of Absence form (see M11.062 for procedures) must be submitted indicating the Maternity Leave. The manager need not obtain prior approval and is empowered to initiate the PAR on his own authority. When completing the Request for Leave of Absence forms, "note the date of return" as six months after the "beginning date."

A pregnant employee may continue working for as long as she desires before delivery and then be granted a leave of absence at the end of which she may return to her old position or another of similar content and pay. The company may require certification after the 7th month, on a periodic basis that the employee is physically able to continue working. Such certification must come from the employee's doctor.

If the employee does not report for work on the scheduled "date of return" or notify the company of

other circumstances the employee will be automatically terminated as of the noted "date of return."

M11.064 *Military Leave*

Any employee who leaves the service of the Company for one of the following reasons will be placed on Military leave. The Personal Action Report will be submitted as per normal policy, specifically indicating Military leave.

To qualify for a Military leave, employee must be:

1. Called to active duty as a member of the Army, Navy, Marine, Air Force or Coast Guard Reserve or as a member of the National Guard.
2. Enlisted for active duty for a period of not more than four years (unless enlistment extended by law) as a member of the Army, Navy, Marine, Air Force or Coast Guard Reserve or as a member of the National Guard.
3. Drafted under the provisions of the Selective Service Act.

An employee who qualified under this section will be reinstated without loss of seniority. Time in service is, thus, considered as time on the job. Such time will be added to his Company service prior to military leave, thus actually providing no break in seniority.

M11.065 *Jury Duty*

An employee will be paid his regular salary while serving on jury duty. Also, there will be no deduction from vacation time for jury duty time.

M11.066 *Voting Time*

Employees will be granted a reasonable amount of time off to vote where distances may make it impossible for the employee to vote before or after working hours.

AETNA FINANCE
ITT AETNA MANAGEMENT COMPANY

Management Manual

Chapter M9 - *CREATIVE DISCIPLINE*

GUIDE-OUTLINE

(Chapter Revised 6-19-72)

ITT AETNA MANAGEMENT COMPANY

Management Manual

Chapter M9 - *CREATIVE DISCIPLINE*

M9.00 INTRODUCTION

M9.001 *Why Policies, Rules and Procedures Are Important*

Just as society needs clear laws and ordinances in order to run smoothly and efficiently, businesses need rules, policies, and procedures to maintain smooth operations and to insure continued success and internal harmony. A society without laws or business without rules could not long exist. In a very small business, rules may be relatively few and they may exist informally. In

larger organizations, such as Aetna, which is spread over a wide geographical area, it is desirable to systematize policies, rules, and procedures and to make them available to all personnel so that employees are able to govern themselves accordingly. This also permits all levels of management to achieve a uniform standard in the enforcement of rules. Furthermore, written rules and regulations prevent misunderstandings, and tend to insure that each employee will receive uniform treatment.

M9.002 *The Manager's Role in Rule Enforcement*

In ITT Aetna's Management Manual, Chap. M11 - *Personnel Policies and Benefits,* there are a list of the company's general rules of behavior and conduct. All employees and officials of the company must comply strictly with these standards of behavior, and it is, therefore, your responsibility to be familiar thoroughly with these rules; you must insure also that your employees know and understand them. Having done this, it is your responsibility to secure full compliance from your employees. If the rules appear ambiguous to you, or you believe at any time they are in need of revision, it is expected that you will suggest clarification or modification to the Personnel Department.

In addition to these rules of conduct, the company's policies and procedures with regard to the performance of all field office work, are clearly set forth in the operations training materials supplied to you and your employees. It is one of your primary responsibilities to see that each of your employees understands how he is to perform each part of his job and why he is to perform it that way and in no other way, and to take prompt

corrective action to eliminate deviations from prescribed practices.

Most of your employees are anxious to do a good job, and they will try to do what the company wants, and to conform to your wishes as their Manager. Fortunately, therefore, if you operate a well-run office, the need for disciplinary action will not arise frequently. Most of your employees will accept complying with rules as part of their job. Most of them will attempt to carry out the policies and procedures affecting them to the best of their ability. Therefore, the main part of your job is to insure that your employees know and understand what is expected of them.

However, when the occasional case of intentional disregard of an established rule occurs, or when one of your employees begins consistently to show signs of careless or slipshod work, poor attitude, or insubordination, prompt corrective action on your part is vital to the continued efficiency of your office and the morale of the other employees. Under no circumstances can you afford to permit negligence, discourtesy, infractions of the rules of conduct or disregard of operations requirements in your office. Your employees need strong leadership, as well as understanding leadership, to attain maximum efficiency on their jobs, and to work together harmoniously.

Strong leadership does not mean harsh or militaristic leadership. It means that, while you must accord your employees humane and dignified treatment, you must also be firm and exacting in requiring from each employee his very best efforts. You must require from each employee a full day's work for a full day's pay, in re-

turn for fair and sympathetic treatment from you and the company. You must take the time to appreciate the problems of your employees and guide them to maximum efficiency through a friendly and relaxed relationship. At the same time, however, you must not accept or tolerate laxness or undesirable attitudes and actions on the part of your employees. When these kinds of things occur, you must act quickly, wisely, and firmly to correct the situation.

M9.003 *Scope of This Chapter*

Opening with a detailed coverage of the various types of disciplinary action and how to apply them, this chapter moves on to a discussion of company policy and procedures for reprimanding or discharging employees when warranted by their conduct or manner of performance. The chapter concludes with a general summary of Aetna's concept of employee relations.

POLICIES AND PROCEDURES

M9.01 TYPES OF DISCIPLINARY ACTION

There are four common types of disciplinary action of which the company recognizes the last two:

(1) Suspension without pay

(2) Demotion in position or pay

(3) Discharge

(4) Verbal reprimand

M9.011 *Suspension Without Pay*

Suspension of employees without pay for rule infractions or poor work performance is not permitted. The

indignity of being suspended and the loss of pay always has the possible effect of embittering the employee. It is most likely that the result of such a suspension would be strained rather than better relations between you and the employee. Another important reason for barring suspensions is that this method results in a hardship on you and the other employees by further increasing their workload during the time that the disciplined employee is off work on suspension.

M9.012 *Demotion in Job Level and Reduction in Pay*

Reduction in pay or demotion to a lower position is a form of disciplinary action that is used by some organizations. However, like suspension without pay, it is not permitted in Aetna as a method of discipline. It is a common experience with demotion for disciplinary reasons that the employee becomes so deeply resentful of the action that his future work is vitally affected. In many other cases, employees simply quit at the time of the demotion or shortly thereafter.

M9.013 *Discharge*

There are still a few people of the "old school" who feel that an employee should be fired immediately if he is found to have broken a rule. Aetna believes this is wrong, both from a moral and economic standpoint. Setting aside the moral issue, in these times of short labor supply, it is economically unsound for you to discharge an employee if, with a reasonable effort, he can be retained.

Except for extreme misconduct, such as drinking on the job, physical violence on the part of the employee, immorality or theft, do not discharge employees for a

first offense. You should give an erring employee a chance to redeem himself if the offense or failing is not drastic in nature.

M9.0131 *The Cost Factor*

Each employee of your office represents a large investment both in time and money. After hiring new employees, it costs money for you to take their time and yours for the purpose of training them to the point where they can perform their jobs efficiently. Research studies have shown that this training may vary from a cost of less than $100.00 up to several thousands of dollars. If you fire employees on the basis of minor, although aggravating infractions, it may penalize you and the company more than the employee.

M9.0132 *Selection Factor*

Usually, when it is necessary to discharge an employee, you have failed somewhere along the line. Perhaps a bad selection had been made in the first place. Perhaps you failed in your responsibility for explaining the rules properly. You may have done less than a good job of training, or you may not have checked on the employee's conduct regularly enough to insure continued good performance.

M9.0133 *As a Solution*

There are times when discharge is your best solution to a disciplinary problem. In such cases you should act quickly and forthrightly. However, as a general rule, an employee should be discharged only after other reasonable efforts have failed. When it is necessary to discharge an employee, you should analyze what went wrong so that you can avoid a recurrence of the same problem in the future.

M9.014 *The Verbal Reprimand*

Generally, the verbal reprimand is the device you will use most often to discipline employees. The verbal reprimand is one of the most effective methods of disciplining when it is planned right and administered properly and wisely.

M9.0141 *Correct Use of the Verbal Reprimand*

Some sound basic principles are listed below as a guide to assist you in getting the best results from the use of the reprimand. When informal and routine efforts to correct deficiencies have failed to produce results, a serious discussion between the employee and yourself is in order. This is the verbal reprimand. When the time becomes apparent for more serious and direct action than routine correction, observe carefully the following principles:

Take time to get your facts lined up in brief outline before you get together with the employee. Think through the employee's overall performance, his value to you and the company, and his potential. Then decide on the best approach to the employee, in relation to his personality and background. Arrange your outline for the talk so that you have before you all the points you wish to cover and the questions you want to ask the employee. This will insure you that you will not overlook things of importance during the interview.

After you have completed your talk with the employee and decided on a course of action (See M9.0148 below), record the pertinent facts concerning the discussion on the employee's Employment History Card (See M5.0132).

M9.0142 *Take the Employee to a Private Place*

Never reprimand an employee in front of his fellow employees or customers. Most employees have an intense sense of personal pride, and, if you criticize them severely in front of others, they very often will become vehement in their own defense. If you try to dress an employee down in front of others, very likely you will find yourself in the position of having a "scene" on your hands. You very probably will have to back down to the employee, or fire him on the spot. On the other hand, he may quit, which is equally undesirable since it would be unfortunate to lose a valuable employee if the infraction itself did not warrant your firing him. Very often the same employee who would hotly defend himself if you accused him publicly, would admit his failing honestly to you in private. Arrange quietly for the employee to stay a few minutes after closing when other employees have left the office. If it is necessary to reprimand an employee during office hours, take him to a closing room and speak in very low tones. An occasion such as this is important enough for you to leave word with other employees that you are not to be disturbed.

M9.0143 *Be Firm But Don't Lose Your Temper*

Before you can master the art of disciplining an employee properly you must master your own emotions. A

display of temper is not only unbecoming to your dignity as a Manager, but is quite liable to interfere with a fair and objective solution of the problem. This does not mean that it is necessary for you to approach the subject pleasantly. If you have cause to be upset, the employee should know it. It is a matter of being serious, firm, and stern, —but not explosive.

It generally is better not to waste much time with preliminaries; that is, you should get down to the business at hand fairly quickly. However, there is a distinct advantage in terms of winning the employee's full cooperation by beginning with a statement about some of his good points. For example, you might say (if true):

> "John, you know, I've always thought pretty well of your work. As a matter of fact, I don't know of any other Field Representative we've ever had who could work as fast as you do."

Then ask the employee about the problem at hand.

M9.0144 *Avoid an Accusing Attitude*

No matter how sure you think you are of the facts, begin with questions rather than accusations. Ask the employee if he did or failed to do whatever you plan to discuss. *Ask* him what he did, and why he did it. There is no more serious mistake you can make at a time like this than to accuse an employee falsely or even to accuse rightly and then learn that the apparently wrong deed was justified by circumstances unknown to you.

For example, after bringing up some of the employee's good points, you might say something like this:

"A point has come up about your work which has caused me some concern. I'd like to ask you about this report of yours on that outside call you made to Mr. Edwards yesterday. You reported that you visited Mr. Edwards' home yesterday at 2:30 in the afternoon, and that his wife told you he had gone out of town. Now, here's the problem: It so happened that both Mr. Edwards and his wife were here in the office talking to me yesterday afternoon between 2:15 and 2:45. There appears to be a discrepancy somewhere. What you you suppose could have happened?"

M9.0145 *Verify the Employee's Story*

If the employee brings up points in his defense that you hadn't considered, or which you are not sure are good points, bring the interview to a close for the time being. By giving the employee a "rain-check" at this time, you can investigate his story or points, and continue the interview at a later time if necessary.

For example, if in his hypothetical case, the employee stuck to his story and claimed that in spite of the apparent discrepancy he did visit the house at 2:30 yesterday and did talk to Mrs. Edwards, and that she did say Mr. Edwards had gone out of town, you might say something like this:

"All right, John, I'm glad you told me these things. Let me investigate this a little further and I'll talk to you more about it later."

As a result of your investigation, you might find that the employee was lying and your course of action in the subsequent interview would be guided accordingly. On the other hand, you might find that the employee was right in spite of the apparently clear-cut guilt. As an

illustration we might complete this case by assuming you discover on further checking, that Mr. Joseph Edwards, the customer, and his wife live in the same house with Mr. Phillip Edwards, his brother and not a customer, and his wife. Your investigation might have revealed that the employee did visit the house at 2:30. In response to his knock, a woman answered the door and when the employee asked for Mr. Edwards, responded that she was Mrs. Edwards and her husband was out of town. The difficulty was one of mistaken identity and the employee was at fault to the degree that he failed to ascertain if he were talking to the right Mrs. Edwards. However, this is certainly less serious than falsification of a report, and you would have a different matter for discussion with the employee. Again, the basic reason for a reprimand is to get better performance. Your job is not to punish but to get the employee to be a better employee.

M9.0146 *Summarize the Problem*

Once you are sure of all facts, including those developed in the interview, state the problem to the employee as you see it, and review the employee's excuse or reasons to be sure you see eye-to-eye about it. You might say, for example, to an employee who is habitually late for work:

> "Miss Fuller, your records indicate that you have been coming in to work on an average of a half-hour late two or three days a week. Now, I understand from Mrs. Ellington, the cashier, that this has been due to transportation difficulties - is that right?"

The employee, of course, may disagree with your understanding of the problem, or the reason or excuse you understand has been set forth. If she disagrees with

your view of the problem, she may or may not have a good point. She may say she disagrees but not come up with anything to support her disagreement. In this case, you should treat the reaction the same as agreement and go into the solution of the problem. For example, you might say in response to a pointless defense on the part of the employee:

> "Nevertheless, the problem of your lateness is a serious one to me, and we have to do something about it."

On the other hand, if the employee disagrees with your summary of the problem and/or your view of the excuse or reason given and makes a good point, or one that requires further study on your part, terminate the interview. Investigate further, and secure the additional facts needed to make your decision about the case. Then you can take the matter up again later, if desirable.

M9.0147 *Talk Straight to the Employee*

Once you have determined beyond any doubt that the employee was remiss, talk straight from the shoulder in a manner which is clear and unmistakeably firm. Avoid sarcasm and bitterness, but talk sternly and seriously without mincing words. Impress on the employee the seriousness of what he has done or failed to do and let him know in definite terms that it is not to happen again. Remind the employee that his future career with the company depends on what he does to correct the problem.

At this point, it is most important that you take into consideration individual differences. The sensitive employee should be handled in a milder, but stern, manner than the tough-minded employee for whom more direct and forceful statements may be necessary.

M9.0148 *Ask the Employee To Suggest Solution*

When you have finished reprimanding an employee, ask him for his ideas on preventing a recurrence. People strive harder to make *their* ideas work than to make *your* ideas work. Hold back any suggestions of your own until you have given the employee every chance to come up with a good solution. If the employee makes a good suggestion, tell him you like his idea and that you think it will work if he tries hard enough. When an employee can't make a suggestion for solving his problem, or can't make one that is acceptable to you, then come out with your solution. Tell him why his idea won't work or isn't acceptable and tell him what you think had better be done. Remember, hold back your own solution until you are sure that the employee can't suggest a good answer himself.

M9.0149 *Don't Leave the Employee Feeling Worthless*

When an employee accepts responsibility for misdoings, and has been talked to sternly about the matter, you should be sure not to leave him feeling completely low in spirits. The fact that you have chosen to reprimand the employee rather than discharge him is indicative of the fact that you believe the employee is worth retaining. Therefore, in closing a reprimand interview, take a few minutes to pickup the employee's spirits. Reassure him that if he straightens out, he still has a fine career ahead of him in the company. Let the employee know that as far as you are concerned, the issue at hand can be overcome readily by future good performance.

THE BASIC REASON FOR A REPRIMAND IS TO GET BETTER PERFORMANCE. YOUR JOB IS NOT TO PUNISH, BUT TO GET THE EMPLOYEE TO BE A BETTER EMPLOYEE.

M9.02 PROCEDURE ON DISCHARGING EMPLOYEES

M9.021 *Authority to Discharge*

The Manager is authorized to discharge any employee, male or female, with less than six months of service with Aetna. It is his responsibility to make recommendations to his Region Manager for discharge of other employees and obtain the Region Manager's approval of such dismissals.

In cases of violations of Company policy (M9.022), the Region Manager should be consulted before the employee is discharged, regardless of length of service.

M9.022 *Gross Misconduct in Violation of Company Policy*

When you find an employee guilty of gross misconduct, such as drinking on the job, engaging in physical violence, falsifying reports, or dishonesty in any form, act immediately. Send the employee home and call your Region Manager by telephone for authority to discharge. If the Region Manager is not available, call the person next highest in authority. If you obtain authority for discharge, notify the employee when he reports for duty the next day. After this, prepare a complete report and forward it with the Personnel Action Report to the Personnel Department.

M9.023 *General Inefficiency or Lack of Interest*

When you decide to discharge an employee because of repeated but minor faults, such as chronic tardiness or absenteeism, habitual carelessness, or inability to perform duties properly, discuss the faults with the employee and give him the opportunity to correct the fault. If he doesn't correct the fault, proceed to replace him.

M9.024 *Termination Allowance*

Employees terminated for reasons listed in M9.023 (inefficiency, lack of interest) will be eligible for a termination allowance, as prescribed in Chapter M11-*Personnel Policies and Benefits.*

Employees who are terminated by the company for reasons listed in M9.022 (violations of company policy) are *not* eligible for a termination allowance.

M9.025 *Considerations Which May Not be Used to Justify Discharge of an Employee*

1. An employee may not be discharged solely because he or she has been arrested and charged with a misdemeanor. If the employee is released from custody, and is free pending trial, employment should not be terminated, solely because of the arrest.
2. An employee may not be discharged solely because his or her wages have been garnished for *one* indebtedness. Termination for this reason violates federal law.

   In UCCC states, an employee may not be discharged for one *or more* garnishments if the second or later garnishments are made on debts which were incurred for personal, family, or household expenses.

(Revised 6-19-72)

M9.03 AETNA'S CONCEPT OF EMPLOYEE RELATIONS

The management of Aetna has gone to considerable lengths to assist you in the efficient management of your office by developing and providing you with a modern per-

sonnel program. Our personnel policies are designed to help you attract and retain good employees. Your company is sincerely interested in the welfare of its employees, and as a Manager you must take a similar interest. It is our firm policy that everyone working with Aetna is entitled to fair and sympathetic management and part of your job is to apply this policy in managing your employees.

However, recognition of each employee's rights to fair and sympathetic management does not mean that you are expected to coddle or pamper employees. It does not mean that the company expects you to allow your employees to do as they please simply in order to keep them happy. Every member of our organization is expected to turn in a good day's work every day, and to get along with his fellow workers. All your employees must maintain a respectful attitude at all times to you and our customers. They must be honest with us, follow instructions faithfully, act with good judgment and prudence at all times, and observe the spirit and letter of all company rules, policies and traditions.

M11.027 *Special Provisions*

M11.0271 *Salary Advances*

Salary advances, not to exceed one week's pay, may be made in an emergency in accordance with the following provisions only:

1. Written approval must be granted in advance by the Region Manager.
2. The advance must be repaid on the first payday following the date of advance. The Manager must then advise the Region Manager in writing that the advance has been repaid.

M11.0272 *Termination Pay*

1. *Resignations* - If an employee gives five working days notice of resignation, he will be paid for five days from the date such notice is received whether or not he actually works during those five days. (Whether the employee shall be required to work during the notice period is at the option of the Company.) Resignation notice in excess of five days must be requested through your office's Region Manager and Divisional Director with final approval to be given *only by* the Director of Operations.

2. *Discharges* - If employment is terminated by the Company for any reason other than a staff reduction, then five days notice or five days pay in lieu of notice will be given to discharged employee. (Exception: See Item 3, "a" and "b".)

3. *Exceptions to the above policies are as follows:*

   a. An employee who resigns or is discharged may be entitled to either termination pay or vacation compensation, but *not both.* The one to be paid will be the figure which is greater. (Exception: See "d" below.)

   b. No termination pay or vacation compensation will be given to any employee who violated his employment contract or who is discharged for misconduct, dishonesty, or violation of Company rules.

   c. All termination pay and vacation compensation must be approved by the Director of Personnel. A full explanation of the reason for resignation or discharge must appear in Section 1 of the Personnel Action Report.

   d. Vacations are earned as of May 1st. Therefore, anyone terminating prior to the 1st of May is not entitled to any vacation pay.

4. *Employee Staff Reductions* - A separate policy from the above will apply in situations where employment is terminated because of a reduction in the authorized number of employees in an office. This includes those cases where an employee is terminated from an office undergoing a reduction and,

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ITT CONSUMER FINANCIAL CORP.

POLICIES AND PROCEDURES

SUBJECT

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

NUMBER 300-10

APPROVAL
President

PAGE 1 OF 3

I. INTENT

To express formally that it is ITT Corporation's policy that qualified applicants will be employed and trained during employment wthout regard to race, color, religion, sex, age, national origin or physical or mental handicap.

II. SCOPE

This policy is applicable to all aspects of the employment relationship, including hiring, placement, upgrading, transfer or demotion. The policy will be followed in all phases of the recruitment process, including advertising and solicitation for employment, whether by printed media or verbal discussion. The policy will also apply to training during employment, rates of pay or other compensation, selection for training and selection for layoff or termination, and all other terms and conditions of employment.

III. DEFINITIONS

A. Equal Employment Opportunity by Federal contractors as defined in Executive Order 11246 and amended by Executive Order 11375, prohibits discrimination in employment. The provisions of the Federal Civil Rights Act of 1964, Title VII, have been further defined by the Equal Employment Opportunity Act of 1972. It refers also to any subsequently applicable amendments.

B. Affirmative Action is defined in Revised Order 4, paragraph 60.210 of the OFCC Sex Discrimination Guidelines, as "a set of specific and results-oriented procedures to which a contractor commits himself to apply every good faith effort" in eliminating the vestiges of past discrimination within his/her work environment.

IV. POLICY

A. All qualified applicants will continue to be considered for all position categories where openings exist.

B. All recruiting sources will continue to be informed of ITT's desire for qualified candidates without regard to race, color, religion, sex, age, national origin or physical or mental handicap.

C. Special efforts will continue to be made to specifically seek out qualified minority group members and females for employment.

D. All employees will continue to be given the same opportunity to participate in and take advantage of Company-sponsored training and personnel development programs, including the tuition-refund program.

E. All employees will continue to receive equal treatment in questions of transfer, promotion, upgrading, and all terms and conditions of employment. Selection for these will continue to

be based on job qualifications. Periodic reviews under the audit responsibility mentioned in V. A. 3 below will be made to assure such equal consideration.

F. Separation of employees will continue to be based solely on justifiable cause and will not bear any relationship to race, color, religion, sex, age, national original or physical or mental handicap.

G. Consistent with applicable valid laws, all ITT Corporation facilities will continue to be maintained on a completely nonsegregated basis.

V. RESPONSIBILITY

A. The President of the Corporation shall ensure that this policy is brought regularly to the attention of all Department Heads, Managers and Supervisors responsible for, and involved in, the employment and promotion of personnel and shall take such steps as are necessary to acquaint all employees of our policy of merit employment and merit advancement.

B. The Director, Personnel is designated as EEO Coordinator. Responsibilities include:

1. Formulate and define objectives consistent with positive equal employment opportunity standards: develop policy statements and affirmative action programs.

2. Clearly communicate EEO objectives to managers, supervisors and employees.

3. Design and implement audit and reporting systems to measure the effectiveness of ITT Financial programs; assist in the identification of problem areas; assist management in arriving at solutions to problems.

4. Serve as liaison between the Corporation and enforcement agencies, minority organizations, women's organizations and commun-

ity action groups concerned with employment opportunities for minorities and women.

C. *General Management*

1. Assumes direct responsibility for implementation of the Equal Employment Opportunity and Affirmative Action Program of the Company.

2. Delegates to operating and staff departments specific phases of the Equal Employment Opportunity and Affirmative Action Programs.

D. *Department Managers and Supervisors*

1. Implements on a day-to-day basis the broad policy developed in Paragraph IV.

VI. PROCEDURE

A. Implementing Para. IV. B, the Personnel Department will include in all recruiting advertising, brochures and other media, the legend "An Equal Opportunity Employer-Male/Female".

B. The Personnel Department will make available to all supervisors copies of Equal Employment Opportunity materials as appropriate.

C. The Personnel Department will post and maintain in appropriate places Equal Employment Opportunity posters as developed or required by Federal or State equal employment activities or organizations.

D. The Personnel Department will, on an annual basis, update the Company's Affirmative Action Plan. Copies of this plan will be distributed to all Department Directors.

CIVIL ACTION

NO. 79-165-COL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

DARLENE WHITE,

vs.

AETNA FINANCE COMPANY, INTERNATIONAL TELEPHONE AND TELEGRAPH COMPANY,

PRESIDING: HONORABLE J. ROBERT ELLIOTT, JUDGE

DATE: SEPTEMBER 21, 1981

VOLUME I OF III VOLUMES

APPEARANCES

FOR THE PLAINTIFF: Mr. Jim Patrick
Attorney at Law
831 Second Avenue
Columbus, Georgia

Mr. Kenneth Funderburk
Attorney at Law
1313 Broad Street
Phenix City, Alabama

FOR THE DEFENDANT AETNA FINANCE: Mr. Jacob Beil and
Mr. John Partin

Attorneys at Law
1020 Second Avenue
Columbus, Georgia

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(Page 6) THE COURT: Well, we're not going to talk about that then?

MR. PATRICK: No, sir.

MS. KIRKLEY: Fine, we wanted to make sure, Your Honor.

THE COURT: All right.

MS. KIRKLEY: Four, Your Honor, again in the addendum to their pretrial, they suggested anew that there was a due process obligation involved in this case, and that they would contend her rights under the Fourteenth Amendment had been violated, which is an extremely belated claim not originally pled. It would not be appropriate for the jury in this case in any event, and under Georgia Law would be inappropriate since she was an employee at will.

THE COURT: Well, I can't control the lawyers and the language they use. All I can do is charge the jury on the law at the proper time. If the lawyer wants to use the words "due process" during the trial of the case, I can't keep him from using it, prohibit him from using those words. All I can do is tell the jury—

MS. KIRKLEY: Tell the jury that that's not in the case.

THE COURT: All right. What's next?

MS. KIRKLEY: The fifth one, Your Honor, is we wish to exclude all parol evidence concerning conversation that the plaintiff claims over and over to have had with Mr. Hanson on September 7, 1977.

THE COURT: Well, now, I did some research on that over the * * * (Hanson, page 55).

(Page 55) A. It's one in the same, sir.

Q. It's just a different name?

A. It's still one in the same, Mr. Patrick.

Q. So you use different names for Aetna Finance Company for different—

A. We use the logo ITT, as mentioned before, as a recognition factor.

Q. I show you, Mr. Hanson, what you've previously identified, a portion of this document here which contains several different items. It's the portion of it between these two tab marks of P-1-f one and P-1-f two.

If you can idetify this portion of this book, which is a copy of the ITT Aetna Company management manual.

A. It appears to be a copy, yes, sir.

Q. And this is the manual in use at your local office correct?

A. During the period of prior to 1978.

Q. This document here was in use from 1972 until December 1 of 1978, correct?

A. Yes, sir.

Q. And it is styled ITT Aetna Management Company Management Manual, correct?

A. Yes, sir.

Q. Did you rely upon and follow the policies and procedures set out in that particular book?

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(page 57) writing as to the maternity leave of the company, right?

A. Yes, sir.

Q. All right; now, you have the book in front of you, and I'm looking at a copy here. Would you turn to page M5.0212, please, sir?

A. What is the number again, Mr. Patrick?

Q. M5.0212. That's the top right-hand corner of the page.

A. Yes, sir, it's at the bottom of this page.

Q. Okay; now, would you skip that right over and go to the next page right after that, M5.0223. Do you have that?

A. It's not the next page.

Q. But you've got M5.0223?

A. That's correct.

Q. You recall hearing Mr. Beil's opening statement when he said that Mrs. White was just an employee, terminatable at will and had no contract with your company?

A. That's correct.

Q. Now, would you read the caption on the title of M5.0223?

A. The Employment Contract.

Q. Would you read that first paragraph to the jury, please, sir?

A. "An employment contract must be completed by every new employee. Under the terms of this contract, the employee agrees to observe certain written provisions embodied in the

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(Page 59) Q. All right; now, which chapter in this book states that an employee working for your company is an employee working for your company is an employee terminable at will?

A. As I said, Mr. Patrick, I cannot quote the book page by page. You'l have to tell me. I assume you've read it.

Q. I have read it; I haven't found it in there. I wondered if you could tell us.

A. I don't know.

Q. You know of no place in that book that says—

A. I don't know if it's in the book.

Q. All right; now, the book does have what we call termination procedures though, doesn't it?

A. I think so, yes, sir.

Q. And these termination procedures must be followed by you in terminating an employee, correct?

A. Yes, sir.

Q. They were followed during the time that Mrs. White worked for your company, correct?

A. Yes, sir.

Q. All right; now, tell me when she was terminated.

A. Mrs. White was not terminated.

Q. Is she still an employee?

A. No, sir.

Q. Is she being paid?

A. No, sir.

(Page 60) Q. But she's not terminated?

A. You're referring to when she was terminated?

Q. Yes, sir, I asked you when was she terminated.

A. She became a non-Aetna employee in 1979.

Q. What day, do you recall?

A. March 15, I believe, sir, or March 16.

Q. Why was she terminated?

A. She had been on a six-month leave of absence as a non-salaried employee, and she was terminated as a non-Aetna employee on the 16th of March, 1979.

Q. She was terminated that date?

A. She was terminated on the 16th, effective the 15th.

Q. In terminating her on that date, did you follow the policies and procedures set out in that book to do so?

A. To the best of my knowledge, I did.

Q. Are you familiar with what's referred to as the creative discipline?

A. I'm not familiar with it, no, sir.

Q. I think it's in the—known as M—chapter nine, very last one in the book. The chapters are out of sequence.

A. It's chapter—

Q. It's called M9. I believe it should be the very last one in there. The book is out of sequence, the chapters are out of order.

(Page 61) Would you take a minute and look at that?

A. Go ahead.

Q. Are you ready? Would you go to M9.02, which I believe is the last page or so of that division there, the procedure on discharging employees.

A. Are you referring to M9002?

Q. No, M9.02, the last page on my copy here.

A. Okay, sir.

Q. Would you tell me in there where it says that you can discharge employees who are returning from a pregnancy leave?

A. It doesn't say you can; it doesn't say you can't.

Q. Can you?

A. I have no idea.

Q. Now, Mrs. White returned on March 13, 1978, correct?

A. That is correct.

Q. She returned to work?

A. Yes, sir.

Q. Do you recall that was a Friday afternoon?

A. I don't recall what day it was, no, sir.

Q. But you were there when she arrived?

A. Yes, sir.

Q. And at that time you told her that you did not have a job for her?

A. We told her we did not have an opening at that time.

(Page 62) Q. The reason you didn't have an opening is because Ms. Bambi L. Smith was working in Mrs. White's job at that particular date, correct?

A. That's correct.

Q. In fact, Ms. Smith had been hired when Mrs. White left —in September of '77, isn't that true?

A. That's true.

Q. In fact, she was hired to take Mrs. White's place. That's also true, isn't it?

A. That's true, because I did not feel Mrs. White would be returning.

Q. And you didn't give her an opportunity to return either, did you?

A. Yes, we did. She—

Q. But her job was gone?

A. She came in on the 13th.

Q. But her job didn't exist any longer?

A. At that point in time, no, sir.

Q. Now, when Ms. Smith was hired, she was hired as a permanent employee, wasn't she?

A. That's correct.

Q. And Aetna, under this very book right here, provides for part-time and temporary employees, does it not?

A. I believe it does, yes, sir.

Q. So it would've been possible for you at that time in

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(Page 70) A. She became a non-Aetna employee on March 16, 1978.

Q. Does that mean she's terminated?

A. She was taken off as an active employee.

Q. Does that mean she was terminated?

A. I don't know if it means she was terminated. She was no longer an employee of our company.

Q. Was she fired then?

A. She wasn't fired.

Q. Was she discharged?

A. She wasn't discharged.

Q. She's just a non-employee?

A. She became a non-employee.

Q. Would you read what M9.024 says to the jury?

MR. BEIL: We renew our objection. That goes into questions of termination, and he's already stated she wasn't terminated. It's irrelevant.

MR. PATRICK: May it please the Court, Your Honor, there's a statement on record in this case that says she was terminated on March 15, 1978 by other counsel.

THE COURT: Well, go ahead and let him read it. We'll see if it has any pertinence.

Q. Please read M9.024, entitled termination allowance.

A. "Employee terminated for reason listed in"—and it refers to another one—"M9.023, inefficiency, lack of interest, will be eligible for a termination allowance as

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(Page 79) Let me let you look at this for a second.

A. Yes, sir.

Q. Now, look at this paragraph two, please, sir. Would you say this is an identical copy of this right here? Get a little closer if you want. Can you see that?

A. Yes. I can't say that's an identical copy because there may be period, commas and question marks or anything else left out of there, Mr. Patrick.

Q. Would you read the two? May I suggest that you have an identical copy of it? Does that satisfy you?

A. Do you want me to read this?

Q. May I suggest that you have an identical copy?

A. That's your opinion.

Q. I believe that it is. Would you like to read both and compare them identically?

A. Out loud?

Q. Well, yes, sir, read it out loud, please.

A. "A six-month leave of absence for maternity purpose will be granted only to those pregnant employees fully returning to work after the birth of their child. A PAR accompanied by a leave of absence form, CM11062,

for procedures maye be submitted indicating the maternity leave. The manager need not obtain prior approval but is empowered to initiate the PAR on his own authority. When completing the request of leave of absence forms, note the date of (page 80) return as six months after the beginning date."

Q. Read the next paragraph, too, please, sir—I'm sorry, excuse me.

A. "A pregnant employee may continue working for as long as she desires before delivery and then be granted a leave of absence, at the end of which she may return to her old position or another position similar in content and pay. The company may require certification after the seventh month or on a periodic basis that the employee is physically able to continue working. Such certification must come from the employee's doctor.

"If the employee does not report to work on the scheduled date of return or notify the company of other circumstances, the employee may be automatically terminated as of the notice—noted date of return."

Q. That is an identical copy?

A. I think so, yes, sir.

Q. Now, this was the maternity leave policy in effect with your company in September of 1977, correct?

A. Yes, sir.

Q. It was the maternity leave policy in effect from 1972 to 1978, December of '78, correct? Until it was changed?

A. As far as I know, yes, sir.

Q. Now, would you tell me or show me in that policy there—and you can refer to the board. Where does it say that

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(page 136) supplemental request to admission, that's part of this record —in this case, not in the State Court, which supplements those answers.

THE COURT: Well, you don't want me to take notice of it. You want the jury to take notice of it.

MR. PATRICK: Read the answer to number nine.

A. "Defendant admits the truth of the statement made in paragraph nine of plaintiff's request for admission of fact and the gemnuineness of the docuents."

THE COURT: What was the supplemental answer?

MR. PATRICK: There was a motion filed to change the answer, but the supplemental answers were never allowed by the Court.

THE COURT: I don't know about that. I don't know one way or the other. Go ahead.

Q. Now, would you read request for admissions number ten, and also the response?

A. Says plaintiffs admit International Telephone and Telegraph was the employer of plaintiff through September 9, 1977.

Q. And the response, please?

A. Defendant admitted the truth of the statement made in paragraph ten of plaintiff's request for admissions.

NEWS — LINES

Court and Government Decisions With Impact on Business, Employes, Consumers

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MATERNITY LEAVE doesn't guarantee employment to a mother after her baby is born, finds a U.S. appeals court in Georgia. Because her job had been filled during her absence, a woman employe of International Telephone & Telegraph was not reinstated after her company-authorized maternity leave. In upholding the termination, the court explains that the woman's contract had no time frame, and she or the company could end the relationship at any time.

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U.S. News & World Report, Dec. 12, 1983
